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The Supreme Court of the United States, which is about to resume its sittings, will open the term with a crowded docket; more crowded, indeed, than it was a year ago. There are about eighty more cases on the docket now than there were then. It has not, of course, experienced as yet, any benefit from the law passed for its relief by the last congress, for the reason that the new additional circuit court judges have not been appointed. Several important cases are set down for argument in October, though it is reported that they may go over on account of the enforced absence of three of the members of the court. Among them is the Sayward case, which involves the question at issue between the United States and England in the Behring Sea controversy. Another important case is that of the Interstate Commerce Commission against the Baltimore & Ohio Railroad Company, to determine whether railroad tickets can be sold in gross to theatrical and other traveling combinations. Other cases of importance are those brought to test the validity of the new tariff act and the recently passed anti-lottery law.

In the lottery cases there are two principal questions at issue. One is whether congress, which cannot pass a law suppressing a lottery in a particular State, can proceed against the lottery indirectly by denying to it, and to those engaged in promoting it, the use of the mails. The contention of the government is that whatever acts or enterprises congress has the power to make criminal in the District of Columbia or the territories, it may refuse directly, or indirectly, to aid, encourage or abet in any State without violating any obligation either to citizen or State. The second question is, whether the law, which among other things prohibits the circulation through the mails of newspapers containing lottery advertisements, is unconstitutional as abridging the freedom of the press. The representative of the government declares that this question cannot really arise until a statute shall be passed forbidding not merely the circulation of papers containing lottery advertisements through the mails, but forbidding the circulation of such newspapers through any agency whatever. Congress, in this view, does its whole duty by the press when it fails to put any restriction whatever upon the printing, publication or the circulation thereof, by those interested therein, through such private agencies as they are able to command.

The resignation, on account of failing health, of Judge Cooley as a member of the Interstate Commerce Commission, will be a serious loss to the country as well as to the body of which he has been chairman since its organization. For some time Judge Cooley has not been in robust health, and it is thought that temporary cessation from work will restore him to health and vigor. His services are too well known to require review in this connection. As a jurist, particularly in the line of constitutional law, he has long been in the front rank. His special acquaintance with railroad law, no less than his general acquirements, made him a most desirable chairman of the commission, and in that office he displayed abilities which were very marked. His retirement from the office will excite universal regret, both because of the reason of it and because of the loss of his eminent and valuable services.

NOTES OF RECENT DECISIONS.

TRIAL—JURY—DEFECTIVE EYESIGHT.—The recent case of Rhodes v. The State, decided by the Supreme Court of Indiana upon principle rather than upon authority, upholds the granting of a new trial because of the defective eyesight of one of the jurors. In his affidavit, presented with the motion, the juror stated that he was unable "to distinguish one from another of the faces of the witnesses; that he did not see the expressions of the witnesses testifying, nor observe their deportment or demeanor." It was held that the juror was disqualified, and that a new trial should be granted. "We think," said the court, "that the juror was not competent to sit, even in cases where the testi-

mony consists entirely of the statements of the witnesses. Again and again have verdicts been allowed to stand because of the effect declared to be exerted by the demeanor and deportment of witnesses; and surely no one who cannot see the expression of faces, nor observe deportment and demeanor, can justly weigh testimony. But in this instance various articles were placed before the jury, and used as illustrative of the testimony, none of which were seen by the juror. Clearly his unfortunate infirmity incapacitated him from properly observing the evidence. Commenting upon this case the *Washington Law Reporter* says:

No lawyer will disagree with the foregoing proposition. It is only a logical statement of a philosophic truth. And yet this juror's condition well illustrates that of the chancellor when trying an equity cause. Testimony when read from cold and unemotional pages is even less the whole evidence than testimony listened to by a blind juror; for in the latter case there is at least the advantage of hearing the voice of the witness. There are but few counsel who have not often felt how much stronger would be their client's cause if the chancellor could only see and hear the plaintiff or defendant, as the case may be, or perhaps some other important witness. And it is safe to say that a large proportion of such cases would have been decided differently if this wish could have been realized.

One of the greatest reforms in equity procedure will come when the legislature makes it the duty of the chancellor to personally hear the testimony of any witness whenever counsel will certify that in his opinion the ends of justice require it, so that it shall not be as now, a mere matter of discretion with the court, who most frequently would refuse to grant such a motion. It must be astounding to the intelligent layman when he considers the inexplicable difference between the precept and the practice of courts of justice. Here is the highest court of a great State announcing the axiomatic fact that "no one who cannot see the expression of faces, nor observe deportment and demeanor can justly weigh testimony," and yet—and the same is true of every other court in the land—it is every day (justly?) weighing testimony without either seeing the faces or hearing the voices of the witnesses; *obscurum* per *obscurius*. Let us not talk about the science of the law until we have expelled from its temples these paradoxes and heterodoxies.

GRANT OF ROOM IN BUILDING—DESTRUCTION BY FIRE—EXTINGUISHMENT OF EASEMENT.—In Hahn v. Baker Lodge, No. 47 A. F. & A. M., decided by the Supreme Court of Oregon, it appeared that plaintiff or his grantor had granted to defendant a certain room in a building. The building was subsequently destroyed by fire. Plaintiff brought the present action to restrain defendant from rebuilding the structure sufficiently to restore the single room which it had owned. The court granted the injunction, holding that whatever defendant's rights may have been, they had been extinguished by the destruction of the building. The following is from the opinion:

Upon this state of facts, the inquiry is, had the defendant the right, which it undertook to exercise, and which this suit is brought to enjoin, of rebuilding the walls for the purpose of reconstructing an upper story, and recreating a middle room, to be used as a lodge hall in the place of the one destroyed by the fire? By its conveyance the defendant had granted to it what was known and styled as the middle room of the upper story of the building, and an easement of ingress and egress. There is no provision in it, or right given to the defendant, in case of the destruction of the upper story by fire, or of the building itself, to rebuild it. It does not, in terms, grant or convey the land, and does not purport to grant or convey the building, but only the middle room or hall in the upper story, and without any stipulation as to rebuilding in case of fire. It seems to us that conveyances of this kind, like leases of apartments in buildings, must be construed according to the intention of the parties, and with reference to the subject-matter upon which they operate. As applied to a lease, the doctrine of the law is, when it is not the intention to grant any interest in the land further than is necessary for the enjoyment of the room leased, that when such room is destroyed there is nothing upon which the demise can operate, and that the lease terminates with the destruction of the thing leased (Harrington v. Watson, 11 Or. 143, 3 Pac. Rep. 173). The application of this doctrine is well illustrated in the case of Stockwell v. Hunter (11 Metz, Mass. 448), in which this question was carefully considered. In that case the lessor of a three story building leased the cellar or basement to a tenant for five years, and the other stories to other tenants; but the lease contained no stipulation as to rebuilding in case of fire, and it was held that the destruction of the building terminated the lessee's rights in the premises. It was put upon the ground that such leases of distinct rooms or apartments do not carry any interest in the land beyond that connected with the enjoyment of the particular room; that the room was the thing leased; and that the destruction of the thing leased necessarily terminated the lessee's interest therein. The real question in all such cases, as it must be in the case at bar, is whether the intention of the parties, collected from the whole instrument, was to grant any estate in the land. The language in the conveyance precludes the idea that it was the intention to grant the building, or any portion of it, but only a certain room located in that building ('the middle room or hall of the upper story'), which is the principal thing granted, and which is identified by description to distinguish it from other rooms.

"As the conveyance does not purport, in terms, to grant any estate or interest in the land, and as the provisions of the conveyance carefully distinguish the room granted from other rooms of the building, and as it contains no stipulation to rebuild in case of fire or other casualty, there is nothing to be taken by implication to justify us in holding that any grant of an estate in the land was intended. It is not doubted that there may be a freehold interest in a part of a building (1 Washb. Real Prop. 18). Nor do we wish to be understood as holding that the sale of an interest in a building may not be a sale of an estate or interest in the subjacent soil. What we are trying to indicate i

that, by the terms of the interest, it is the middle room or hall of the upper story which was granted to the defendant, and not a part of the building; that the defendant did not acquire any right of ownership in the building, or any part of it, but in the room or space inclosed by that part of the building which was described and identified as the middle room or hall of the upper story. This it owned, and so long as it existed, and its identity was preserved, the defendant had the right to its enjoyment. But when the fire destroyed the building, and the identity of the room and its existence as such were extinguished and at an end, there was nothing remaining upon which the defendant's conveyance could operate, and its rights at once terminated. In Thorn v. Wilson (110 Ind. 325, 11 N. E. Rep. 230), where a committee on behalf of the order of Free Masons had granted the right to construct a second story upon a building erected by the owner of the land, 'to have and own said second story for their use perpetually,' it was held that they did not acquire any proprietary interest in the freehold of which such second story became a part. "In construing the instrument the court say: 'It is evident that the instrument relied on by the appellant does not convey an interest in the land, and then adds: 'For it is quite clear that, if the buildings should be totally destroyed, the rights of the appellants, and of their grantors as well, would at once terminate.' As the instrument grants the defendant no estate in the land, and contains no stipulation of the right to rebuild in case of destruction by fire or other casualty, it would seem to be plain that it was the intention of the parties, collected from their agreement and its subject matter, that the agreement, and the relation created by it, should terminate with the destruction of the building.

"The remaining question is whether the easement for the purpose of ingress and egress was extinguished by the destruction of the building. The facts show that such easement was granted for the particular purpose of affording ingress and egress to the building. Without it the principal thing (the room granted) would be practically useless. It was essential and necessary for the enjoyment of the room, and was granted on account of it. Nor is it of any use, within the purposes of the grant, without the existence of the room. In such case, the general rule, as stated by Mr. Washburn, is that, 'if an easement for a particular purpose is granted, when that purpose no longer exists, there is an end of the easement' (Washb. Easem., pp. 654, 657). When the reason and necessity for the easement ceased, within the intent for which it was granted, as it did when the building was destroyed by fire, it would logically result there was an end of the easement. For these reasons we think there was no error upon the legal questions presented by this record, but that the damages awarded are not justified by the facts under the circumstances, and that the decree awarding them must be disallowed, but in all other things affirmed, and so it is ordered."

TELEGRAPH COMPANY—DELAY IN DELIVERING MESSAGE — ILLEGAL TRANSACTION.—In Gray v. Western Union Telegraph Company, 13 S. E. Rep. 562, the Supreme Court of Georgia decide that after receiving a telegram for transmission, and accepting payment for the same, the company cannot defend an action for the statutory penalty incurred by failure to deliver it with due promptness, on the ground that the contents of the telegram related to a sale of futures, and consequently to an illegal transaction. Bleckley, C. J., says:

That the United States mail might lawfully carry either a sealed letter or an open circular from Ft. Valley to Macon, though the contents of the document related to the purchase and sale of futures, is certain. Equally certain is it that a common carrier between these points might innocently transport a passenger whose known business was to make a trip for the exclusive purpose of buying or selling futures, or might carry and deliver a bundle of stationery intended by the consignee for use in his business as a dealer in futures. In each of these cases the object sought to be subserved by the writer, the passenger, or the consignee would simply be irrelevant. To consider it would be to introduce moral distinctions not pertinent to the function which the mail or the carrier was designed to perform. In like manner, under the statute on which the present action is founded the moral purpose of a telegram is immaterial, provided it is not designed to prompt or promote the commission of a crime or a tort. Telegraph companies, like common carriers, are voluntary servants of the general public. They exercise a public employment, and offer themselves for the transaction of business in behalf of every person who seeks to engage their skill and their special facilities for a peculiar class of work. Their relation to the public imposes upon them the duty of undertaking as well as the duty of performing, and the violation of either duty is a misfeasance—a tort. It is the equivalent, therefore, of an affirmative interference by a mere private person to hinder or obstruct communication. For one of these companies not to receive or not to transmit and deliver a dispatch when it ought to do so, is more than a refusal to contract, or than the breach of a contract; it is a wrong as pronounced as would be that of a person who should forcibly exclude another from the telegraph office, and prevent him from handing in a dispatch which he desired to lodge for transmission. In dealing with the wrong as such, the element of contract is not involved. Why should this company not have transmitted and delivered the reply which the plaintiff sent to his correspondent in answer to a dispatch from the latter which the company had brought to him by telegraph? The dispatch was: "Shall I draw for more *bonus*? Answer quick." The reply was: "If necessary, draw for more *bonus*." It is admitted that the subject of this correspondence was a transaction in futures, a species of gambling of the worst description, and it is on this ground that the failure of the company is sought to be justified. But the statute which we are considering makes by its letter no exception. It declares that every company of this description "shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of $100," etc. Acts 1887, p. 111. In construing and administering the statute, what exceptions can the courts make by implication? Doubtless a dispatch, to be entitled to transmission, must be free from open indecency or profanity, and perhaps other vices of language might condemn it, but, supposing it to be proper in tone and expres-

sion, we should say that the company would have no concern with its import unless it sought to subserve either crime or tort. If it disclosed either of these objects, it seems to us that the company, for its own protection, might and should refuse to handle it. It would be unreasonable to suppose that the legislature intended telegraph companies to aid in the perpetration of crimes or actionable wrongs, for this would be to constrain them to do by legislative mandate what they would have no right to do by their own choice. But, on the other hand, any dispatch which a company could lawfully transmit by its own choice the statute obliges it to transmit and deliver. The power of voluntary selection is denied, for every company is required to transmit and deliver "with impartiality and good faith." A dispatch cannot be rejected on account of its subject-matter, unless by sending it the company would or might subject itself or its servants either to indictment or a civil action. This is a rational test, and one that may fairly be presumed to coincide with legislative intention. If, before the statute was enacted, a telegraph company could at its own will serve one customer and decline to serve another, the dispatches of the two being exactly similar, this option no longer exists. All customers are now to be treated alike. If one can correspond by telegraph touching his speculations in futures, all may do so. There can be no discrimination, no favoritism. The company cannot waive morality for one, and stand on it against another. Now, in this State, it is neither a crime nor a tort to speculate in futures. It is gross immorality, and conflicts with public policy, but it is not indictable nor actionable. On the contrary, by a recent statute dealers are recognized and tolerated on condition of registering themselves and paying a fixed tax. Acts 1888, p. 22. It was certainly the legal right of the company to transmit and deliver the dispatch sent by the plaintiff if it had elected to do so. It would have incurred no penalty, subjected itself to no action or indictment. Moreover, it actually undertook to do it, and received pay for the service; and it had already transmitted and delivered the dispatch to which this was a reply. Why serve one of the parties and not the other? But we hold that it was bound to serve both, for the reason that the law leaves it free to serve them. Where there is such a statute as we are construing, it cannot be a matter of option to obey or disobey. On the contrary, unless some other law forbids what the letter of the statute commands, the letter must prevail. In adjudicating upon a like statute, the Supreme Court of Indiana, in Telegraph Co. v. Ferguson, 57 Ind. 495, held that the company, when sued for the penalty incurred by failing and refusing to transmit a dispatch expressed in these terms: "Send me four girls, on first train to Francisville, to tend fair,"—could not defend by setting up that the dispatch was ambiguous, and that, on account of certain extrinsic facts, the company had reasonable cause to believe and did believe that the girls wanted were prostitutes, and that the object of the message was to draw prostitutes to the fair. It seems to us that this decision was correct. It did not appear that the company or its servants would have been subject either to indictment or to action if the girls called for had been sent and had attended the fair. When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company dealing with it either civilly or criminally for transmitting the dispatch; and hence it would be the duty of the company, in deciding whether to transmit or not, to give the benefit of the doubt to the sender. On no other rule would it be praticable for telegraph companies to perform their legitimate functions as servants of the general public. They could not wait to question and investigate the motives of those who offer ambiguous dispatches for transmission. Indeed, in this State they are required by the same statute we are now discussing to foward dispatches written in cipher, and this enables the sender not only to conceal his motives partially, but to conceal them altogether. This may serve to suggest how little the company is concerned with unlawful or improper motives, unless they are plainly disclosed on the face of the dispatch. The cases of Bryant v. Telegraph Co., 17 Fed. Rep. 825, and Smith v. Same, 84 Ky. 664, 2 S. W. Rep. 483, were not ruled upon any statute, but upon principles of general law. Doubtless it is true that a telegraph company is not bound, even when it contracts to do so, to furnish to "bucket-shops" reports of the market prices of stock and provisions, nor to allow "tickers" for the purpose to remain in the offices of these immoral establishments. But were the supplying of market reports and "tickers" for all applicants, "with impartiality and good faith," enjoined by statute, a different question, and one more germane to the present case, might arise. The Sunday messages adjudicated upon in some of the cases are also without relevancy, for the statute does not purport to prescribe duties except as to dispatches offered "during the usual office hours"—meaning, of course, legal office hours. So far as we are aware, no decision of any court is to be found which holds it illegal for a telegraph company to receive and transmit messages relating to speculative transactions in futures, where that class of business has not been made penal by statute. That damages for breach of contract to correctly transmit a message of that nature cannot be measured by the results of such dealings was decided in Cothran v. Telegraph Co., 83 Ga. 25, 9 S. E. Rep. 836, but there is no suggestion in that decision that the broken contract was unlawful.

OUSTER AS BETWEEN TENANTS IN COMMON.

The principles controlling the solution of the question, when the possession of a tenant in common is to be regarded as adverse to his co-tenant, have been long settled and are well understood, but the application of them to the particular facts of the more recent cases will be found both interesting and profitable.

1. *Co-tenant's Possession not Adverse.*—It follows from the very nature of a tenancy in common, that a co-tenant's possession of the common property, and his acts of ownership over it, are consistent with his title. The possession of one is the possession of all. Therefore, no prescriptive right as between co-tenants can be predicated upon such possession until the relation between them has been disturbed by an "*ouster*" or wrongful dispossession of one by the other. The

ouster of a co-tenant by his tenant in common differs from any other *ouster* only in the evidence by which it must be established. Since the legal presumption that the entry and possession of the latter is under his title must be rebutted, it follows that it must be shown by acts which amount to a disavowal of the title of the co-tenant and a disclaimer of the relation, and that the usurping possession must be so adverse in its character, open, notorious and exclusive of the interests of the co-tenant as to convey notice of an intent to acquire title, as against him.[1]

2. *What is Ouster of a Co-tenant?*—What acts and circumstances, accompanying the possession of a tenant in common, will be regarded as a sufficient disavowal of the cotenancy to set the statute running in his favor, depends largely upon the facts of each particular case. If those facts are susceptible of any other explanation, the possession of a tenant in common will not be regarded as an *ouster* of his co-tenant. Thus, in the recent case of McCloskey v. Barr,[2] where the claimants, who were grantees of a life tenant, obtained conveyances without warranty, of the interests of a number of the heirs of the fee, thereby becoming tenants in common with the other heirs, it was held that during the life on which the life estate was limited, their possession must be attributed to their interest as life tenants and not as co-tenants of the fee, notwithstanding the fact that during all that time their possession was continuous and exclusive and that they received all the rents and profits, paid the taxes and made permanent and costly improvements; that though the possession of the claimants would have been adverse from the death of the life-tenant, if there had been no purchase of the interests of the tenants in common, such purchases were in themselves a negation of any purpose to acquire title, indicated by the facts of taking rents, paying taxes and making improvements. Under a devise of land to the son of the testator with a provision that the widow should continue in possession and occupation of the premises until the son was 15 years old, the son having died in the meanwhile, it was held that the possession of the widow within the period at which the son would have reached that age was not adverse to his heirs.[3] Where tenants in common laid out the land into lots and made joint sales of some of the lots, and afterwards defendant made sales of some of the lots without accounting to his co-tenant who did not join in the conveyance and no other possession by defendant was shown than what was implied by his going upon the land with his co-tenant to lay it out, such facts were held insufficient to show an *ouster*.[4] The employment, by a tenant in common of wild uncultivated land, at a time when he had no adverse claim against his co-tenant, of an agent to look after the land and keep off trespassers, and the continuance of such care by the agent without any different instructions for a number of years after the tenant in common had acquired a tax-title against the interest of his co-tenant is not an *ouster*.[5]

But where a mortgagor sold an undivided half of his equity of redemption and after the mortgage was foreclosed and the property bid in by his co-tenant, also sold him his personal property on the tract and worked for him as foreman on the premises for 11 years, without making any claim of title, it was held that the co-tenant's possession was adverse and the mortgagor's claim barred.[6]

3. *Possession Under a Deed to the Whole Estate.*—Possession by the grantee of a tenant in common, under a deed purporting to convey the whole estate with general warranty, which is peaceable, continuous, open, notorious and exclusive, has been held to be adverse to the co-tenants.[7] In North Caro-

[1] Coogler v. Rogers, 7 South. Rep. 391; Story v. Saunders, 8 Humph. 663; Culver v. Rhodes, 87 N. Y. 348; Adams v. Ames Iron Co., 24 Conn. 235; Newell v. Woodruff, 30 Conn. 498; Bailey v. Trammel, 27 Tex. 328; Warfield v. Lindell, 30 Mo. 283, 38 Mo. 581; Campau v. Campau, 45 Mich. 367, 5 N. W. Rep. 1062; Barrett v. Coburn, 5 Metc. (Ky.) 513; Forward v. Deetz, 32 Pa. St. 72; *In re* Grider's Estate, 22 Pac. Rep. 908, 81 Cal. 571; Lindley v. Groff, 34 N. W. Rep. 26; Berg v. McLafferty, 12 Atl. Rep, 460; Gedney v. Prall, 6 N. Y. Supp. 165; Mayes v. Manning, 11 S. W. Rep. 136, 73 Tex. 43; Peck v. Lockridge, 11 S. W. Rep. 246, 97 Mo. 549; Comer v. Comer, 8 N. E. Rep. 796, 119 Ill. 170.

[2] 42 Fed. Rep 609.

[3] Zeller's Lessee v. Eckert, 4 How. 289.

[4] Stevenson v. Anderson, 6 South. Rep. 285, 87 Ala. 228.

[5] Englich v. Powell, 21 Ind. 458, 119 Ind. 93. See also Hudson v. Coe, 8 Atl. Rep. 249, 79 Me. 83.

[6] Streeter v. Schultz, 45 Hun, 406.

[7] Rutter v. Small, 11 Atl. Rep. 698; Highstone v. Burdette, 27 N. W. Rep. 852, 61 Mich. 54; Adams v. Weathersbee, 1 S. E. Rep. 890, 26 S. Car. 244; Weisinger v. Murphy, 6 Head, 279; Higbee v. Rice, 5 Mass. 344, 4 Am. Dec. 63; Reames v. Hill, 21 Fla. 185; Bath v. Valdez, 11 Pac. Rep. 724, 7 Cal. 350; Burgett v. Taliaferro, 9 N. E. Rep. 334; Greenhill v. Biggs, 2 S.

lina, however, the rule is different. The court there said "if a tenant in common conveys to a third person, the purchaser occupies the relation of a tenant in common, although the deed purports to pass the whole tract and he takes possession of the whole, for in contemplation of law his possession conforms to his true, and not to his pretended title,"[8] and it has been further held that the taking of a deed from a stranger by a tenant in common, in possession of the common property does not operate an *ouster* of his cotenant.[9] And where one of two tenants in common devised her interest to the other for life, a conveyance by him of the whole premsies will not enable the latter to claim adversely to the other heirs.[10]

The effect of the recorded deed to the whole as notice of the intention of a tenant in common in possession to acquire title is in no wise dependent upon the validity of the deed itself as a conveyance. Thus, in a recent California case it appeared that two persons bought a tract of land, one of them paying the entire purchase price under an agreement that the other was to contribute his share within a certain time. This, however, he never did, though he subsequently mortgaged his undivided interest. Pending a foreclosure of the mortgage the other received a tax deed for the entire property, which was duly recorded on the same day, and thereafter remained in open, exclusive and peaceable possession of the entire tract for a period of nine years, fencing it, paying taxes, receiving rents, without accounting therefor, and from time to time entertaining propositions for the sale of the property which was popularly known by his name. The court held that such facts established the adverse character of the possession, notwithstanding the tax deed was void on its face and in nowise affected the title.[11]

But when the circumstances attending the acceptance of the deed and possession thereunder are such as to charge the tenant in possession of the common property, as a trustee, for his co-tenants, such possession, of course, cannot be regarded as adverse. Thus, in the case of Colling v. Collins,[12] recently decided by the New York Supreme Court, it appeared that the property in question was a block of buildings, the lower part of which was used for business purposes, and all the above for offices and living rooms, and that it was so arranged that a partition could not be made without great prejudice to the respective owners; that defendant and plaintiff and another brother inherited the property from their father subject to their mother's right of dower and an outstanding mortgage; that after their father's death the widow and three children, who were all minors, moved into rooms in the building; that the mortgage was assigned to a lawyer in whose office the defendant was a student and was foreclosed by him, at a time when less than one year's interest was due, and when there was no pressure for the money; that defendant served the notice of sale upon his mother who paid no attention to it, presuming probably that he would take care of the interests of his brothers; that publication was made in a country newspaper having but little circulation in the city where the property was situated; that the property was purchased by defendant, who took title in his own name for $2,610, the amount of the principal and interest; that he paid $210 in cash and gave another mortgage for the balance; that the real value of the property was about $18,000, and its annual rental amounted to $1,300; that plaintiff had no notice of the sale and knew nothing of the change in the title and continued to reside with his mother until he was married, when he lived with his wife's family for a year and then he returned and occupied rooms in the building for many years without paying rent; that meanwhile defendant had negotiated for the interest of the other brother and purchased it for $8,000; that defendant, who was a lawyer, while plaintiff's business was of such a character as to take him much of the time away from home, managed the property in connection with his mother, renting it, collecting rents, making repairs,

W. Rep. 774, 85 Ky. 155. But, on the other hand, where a person whose possession of the whole property is adverse to the title of the co-tenants, accepts a deed to one of the undivided shares, it will amount to an acknowledgment of the co-tenancy and will deprive his possession of its exclusive character. Cook v. Clinton, 31 N. W. Rep. 317, 64 Mich. 309.

[8] Day v. Howard, 73 N. C. 6. See also Caldwell v. Neely, 81 N. C. 114.

[9] Page v. Branch, 1 S. E. Rep. 625, 97 N. C. 97.

[10] Hicks v. Bullock, 1 S. E. Rep. 629, 96 N. C. 164.

[11] Oglesby v. Hollister, 18 Pac. Rep. 146. See also Wright v. Kleyla, 4 N. E. Rep. 19, 104 Ind. 223.

[12] 13 N. Y. Supp. 28.

etc. The court held that the purchase by the defendant must be taken to have been for the benefit of all the co-tenants and that his possession had no such exclusive character as would make it adverse to the plaintiff.

But where the tenant in common is already in possession of the premises, the mere acceptance of a deed to the whole, without any apparent change of possession or occupation, will not have the effect of rendering such possession adverse. Thus, where one of the three daughters of decedent, who were the tenants in common of the fee of his farm subject to a life estate in his widow, while living with the latter upon the land, accepted from her a deed to a portion thereof without a warranty, and for a nominal consideration, and thereafter occupied the premises claiming to hold them adversely but without any apparent change of occupation or possession and with no notice of a hostile claim to her co-tenants, it was held, that as her grantor had the right to convey the life estate, both the deed and the possession under it, were entirely consistent with the title of the co-tenants and would not operate an *ouster*.[13] And the purchase by a widow, who was tenant in common of certain lands with the heirs of her husband, of an outstanding tax-title thereto of which her husband had been ignorant and the securing of quit-claim deeds to the interests of all the other heirs except plaintiff will not render her possession adverse to him.[14]

4. *Exclusive Possession—Taking Rents and Profits.*—It is questionable how far the exclusive possession of the common property by a tenant in common taking the rents and profits, without accounting therefor to his co-tenants, will be regarded as adverse to their interests, however long continued it may be. In an early case where an estate in common had been partitioned and allotted to one of the co-tenants during the life of another, and such tenant *per autre vie* held over after the determination of the life estate for a period of 36 years without any account being demanded or any payment of rents and profits, Lord Mansfield told the jury that they might presume an adverse possession and *ouster* and a rule to show cause why a new trial should not be granted was discharged.[15] And in the South Carolina case of Gray v. Givens,[16] in which it appeared that the exclusive possession had continued for 16 years, Chancellor Harper said: "No doubt an *ouster* may be presumed from the mere fact of a very long exclusive possession as in the case of Fishar v. Prosser. * * * It may be that if this case were before a jury it might be within their discretion to find an *ouster*. But I cannot venture to exercise an arbitrary discretion. If I could, I should incline to exercise it in favor of the defendant. I must adopt some rule and what shall it be? Twelve, sixteen or eighteen years? I can think of no other than that bar which is made to quiet almost every other claim and give efficacy to long possession—the lapse of twenty years." This rule has been recently approved.[17] Where the grantee of an undivided interest ignorantly supposing that his deed conveyed the whole property to him, at once took possession of the premises which were wild prairie land, broke it up and fenced it in, paid the back taxes, built a farm house and barns, stables, and cribs, and rented it for six years and collected the rents and afterwards moved upon it and occupied it as a homestead, and such possession continued for more than 20 years until the land was worth $40 to $50 an acre without any demand for an accounting by his co-tenants, two of whom lived near the land, his possession was held to be adverse and their claim was barred.[18] But where a son by permission of his mother entered upon her dower land, and after her death continued in possession of the same for more than 35 years, it was held, in the absence of evidence of any act amounting to a total denial of the rights of the other co-parceners that he acquired no title by adverse possession.[19] And an *ouster* will not be implied from a sole possession of the premises and an exclusive reception and enjoyment of the rents and profits even if continued for the statutory period, unless it appears to have been with

[13] Culver v. Rhodes, 87 N. Y. 348.
[14] Richards v. Richards, 42 N. W. Rep. 954, 75 Mich. 0.
[15] Fishar v. Prosser, Cowp. 217. See also Warfield v. Lindell, 38 Mo. 581.
[16] 2 Hill Ch. 513.
[17] McGee v. Hall, 1 S. E. Rep. 716, 26 S. Car. 179.
[18] Laraway v. Larue, 63 Iowa, 407, 19 N. W. Rep. 242.
[19] Fry v. Payne, 1 S. E. Rep. 197, 82 Va. 759.
[20] Burns v. Byrne, 45 Iowa, 287. See also Gale v. Hines, 17 Fla. 774.

the knowledge and implied acquiescence of the other tenant in common.[20]

Where the common property is a wharf, the possession of one tenant of the entire wharf necessarily excludes the other tenants because it is incapable of separate occupation, and amounts to an *ouster*.[21] But where a tenant in common put the plaintiff into possession of the common property in 1873, under a contract to make him a deed for the whole and plaintiff continued in possession paying taxes and improving the property, some portion of which was inclosed by a substantial fence, until 1887, though she did not receive a deed until 1883, it was held that such possession could not be regarded as an *ouster* of the co-tenants until the deed was passed, and that, as the statutory period had not elapsed between that time and the bringing of the suit, their claim was not barred.[22] And if the exclusive appropriation of the benefits of the common property are accompanied by explanatory facts which negative the intention of acquiring title, such possession, of course, cannot be regarded as adverse. Thus where one of several tenants in common conveyed the land excepting and reserving the interest of his co-tenants, and the grantee took possession under an agreement on his part with the grantor, to pay the taxes, on behalf of the co-tenants, such possession without a subsequent *ouster* cannot be regarded as adverse to them.[23]

5. *Making Permanent Improvements.* — Whether the making of permanent improvements by a tenant in common in possession is a sufficient notice of an intent to acquire title. To make his possession adverse as against his co-tenant, is a question about which some confusion has arisen. In Bennet v. Clemence,[24] the Massachusetts court held that a building erected, principally upon land of one tenant in common, adjoining the common property, a small portion of it being placed on the common property but not enough to be used separately with any advantage to the occupant, was such an exclusive appropriation of a part of the land to his own use, as would amount to an *ouster* of his co-tenant. Mr. Freeman in commenting upon this case and quoting the language of the opinion, which is broader than the facts, out of which the controversy arose, justify, assumes that the decision is authority for the proposition, that "the erection of a permanent structure would be evidence of an" *ouster* and expresses a doubt as to the correctness of the doctrine.[25] If the decision of the court went to that extent, there could be no question but that the doubt expressed by the learned author is well founded. But the decision can be no broader than the facts on which it is based, and the fact was that a small portion only of the building was placed on the common property, and not enough to be used separately. Of this encroachment, which, while useful to the tenant who owned the adjoining lot and erected the encroaching building, from its nature necessarily excluded the co-tenant from any use of the portion of the premises covered by it, the court say: "*Such an exclusive* appropriation of a part of the land to his own use * * * would be evidence of an *ouster*." So interpreted this decision is not in conflict with the later cases.[26]

WM. L. MURFREE, JR.

St. Louis, Mo.

[21] Annely v. DeSaussure, 2 S. E. Rep. 490.
[22] Stoddard v. Weston, 6 N. Y. Supp. 34.
[23] Transportation Co. v. Gill, 111 Ill. 541.
[24] 6 Allen, 18.
[25] Freeman on Co-tenancy and Partnership, § 240.
[26] See McCloskey v. Barr, 42 Fed. Rep. 609, and Larraway v. Larue, 63 Iowa, 407, 19 N. W. Rep. 242.

NEGLIGENCE—EXCAVATION ON LAND—EVIDENCE.

SCHULTZ V. BYERS.

Court of Errors and Appeals of New Jersey, Aug. 10, 1891.

Excavation by an owner on his own land adjoining another's building, causing damage, without his knowledge, or previous notice to him, is evidence of want of care in doing the work.

SCUDDER, J.: The declaration is framed on the idea that the plaintiffs' land, dwelling-house, and building were entitled to support by the adjacent land of the defendant, and that by wrongfully digging away and removing such support the damage complained of was caused, whereby a right of action accrued. A demurrer was filed to this declaration, but it appears to have been waived and the cause was tried on a plea of the general issue and proofs. With this form of pleading, leaving the declaration unaltered, there is difficulty in holding the case in court to determine the exact cause of controversy between these parties. But as the court at the circuit heard and decided

the cause as if the pleadings were amended to present the issue, and the question is important, it will be considered as if it was there tried and decided. It is almost unnecessary to say that the juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance, or statute. As this is a case of recent erection of the building alleged to have been injured, the question of prescription, or lapse of time sufficient to infer a grant or conveyance, does not arise, nor has such right ever been conceded in our courts. The principle of the lateral support of lands and buildings was settled in this State by the case of McGuire v. Grant, 25 N. J. Law, 356, (1856). As to land in its natural condition, there is a right to such support from the adjoining land; as to buildings on or near the boundary line, injured by excavating on the adjoining land, there is no right of action, in the absence of improper motive, or of carelessness in the execution of the work. This is the law as established by the cases prior to that decision. It has remained the unquestioned law in this State since that time, and it has been confirmed by many cases since in other courts. Some of the most recent are very valuable for reference, notably Gilmore v. Driscoll, 122 Mass. 199; Dalton v. Angus, L. R. 6 App. Cas. 740, 3 Q. B. Div. 85, where a most thorough examination of the subject will be found. Although this law seems to give the owner of a building put upon his own land, in a manner most advantageous and sometimes necessary to make it available for his use, especially in a closely built city, but little protection against the choice or caprice of another who may own the adjoining land, yet it will be observed he is not entirely without protection. Neither can say, "It is lawful for me to do what I will with my own," as has been sometimes loosely stated in discussing this subject, and that it is a man's folly to build near the dividing line between his land and that of his neighbor, for it is more frequently his necessity that compels him to do so. The rights of the parties are equal, and are subject to modification by the conflicting right of each other. Our statute relating to party walls (Revision, 809) shows that in some cases it has been thought necessary to fix authoritatively the mutual concessions and limitations in the rights of adjoining land owners. This statute only applies where the excavation is more than eight feet in depth, while in this case the digging is but seven feet deep; but it is a recognition of the reciprocal right and duty which sometimes grow out of the mere vicinage of property. The maxim, *sic utere tuo ut alienum non lædas*, is often invoked in such cases, and is of very wide application. In this case the limitation of this principle is that, if the owner of adjoining land would dig down beside the foundation of his neighbor's house, he must exercise his right to do so, not carelessly, but cautiously. There was no proof, or offer to prove, at the trial, that the defendant was negligent in digging his cellar, whereby the plaintiffs' house was caused to settle, and the walls to crack, beyond the mere fact that this was the result. This result alone was not sufficient, for it may have been caused by defects in the plaintiffs' house. The special ground of complaint is that it was done without the knowledge of the plaintiffs, and without notice to them, by which they might have been enabled to protect their property. It is argued that the defendant thereby took upon himself the whole risk of injury to the building. The question whether such omission to give notice, under the circumstances stated, is evidence of carelessness in the execution of the work, is an important one, and it cannot be said to be definitely settled. The case most frequently cited in this country in favor of requiring such notice is Lasala v. Holbrook, 4 Paige, 169-173, (1833). In this case Chancellor Walworth, while affirming the right of the owner of adjacent land to excavate for improvement on his own land, using ordinary care and skill, without incurring damages for injury to a building supported thereby, says: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor, by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same." He cites Peyton v. Mayor, etc., 9 Barn. & C. 725, 4 Man. & R. 625; Walters v. Pfeil, 1 Moody & M. 362; Massey v. Goyder, 4 Car. & P. 161. In Peyton v. Mayor, etc., it was held that the plaintiff could not recover, because the defendant had not given notice of his intention to pull down his supporting house, that not being alleged in the declaration as a cause of the injury. Lord Tenterden says, because of the failure to allege want of notice, the action cannot be maintained upon the want of each notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand, upon which point of law we are not in this case called to give any opinion. In Massey v. Goyder, where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundation of a building, it was held that he was only bound to use reasonable and ordinary care in the work, and not to secure the adjoining premises from injury. In Chadwick v. Trower, 6 Bing. N. C. 1, 8 Scott, 1, (1839), it was decided in the exchequer chamber that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall. This case was first considered in 3 Bing. N. C. 334, and cited in 2 Scott, N. R. 77, and 5 Scott, N. R. 119. In the argument, when it was urged that, if it be a duty imposed on a party not to do work so incautiously as to injure his neighbor's rights, and it is clearly a want of proper caution to omit giving such notice as may enable the neighbor to take steps for his own security, Parke, B., replied: "The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law." But if it be

a duty effecting property rights, and the breach causes damage, it would seem that the law must afford a remedy. In Brown v. Windsor, 1 Cromp. & J. 20, Garrow, B., said: "There may be cases where a man, altering his own premises, cannot support his neighbor's and the support, if necessary, must be supplied elsewhere. In such case he must give notice, and then, if an injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution." There are no later cases that I have found in the English courts which change the rule given in Chadwick v. Trower, and that is therefore supposed to be the present law in England relating to this subject, though the cases above cited refer to support by adjoining buildings. There are very few cases in our country which bear directly on this point. Shafer v. Wilson, 44 Md. 268, is most frequently referred to, after Lasala v. Holbrook, above cited. It is there said that notice to one's neighbor of an intention to make a contemplated improvement of property would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made by one proprietor, however skillfully conducted, may be attended with disastrous results to his neighbors, who ought to have the opportunity to protect themselves and property. To the like effect is Beard v. Murphy, 37 Vt. 101. Chancellor Kent (3 Comm. 437) has quoted the case of Lasala v. Holbrook, and this has been referred to in Shafer v. Wilson and elsewhere. Washb. Easem. 434, 435; Shear. & R. Neg. 497; 1 Thomp. Neg. 276; and other text-books, cite these cases, and from such quotations it is impossible to determine how far the requirement of notice has passed into the general law of the courts in this country. None of these cases are of binding authority in this court, and, in a case of doubt like this, we should seek for that result which is most reasonable and just. Where the danger of loss in doing a legal act is not equally balanced, we should lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house, may enable the receiver of notice to shore or prop his wall to prevent its falling, or it may lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause to his neighbor without such warning. The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property. Where it can be shown that such owner had knowledge of the improvement that was about to be made, it would not be necessary to prove a formal notice given to him. In this view of the case, there was error in rejecting the evidence which was offered to show that the defendant gave no notice to the plaintiffs of his intention to excavate the land adjoining the house of the plaintiffs; and the judgment will be reversed.

NOTE.—The question at issue in the principal case, is a narrow one. It is not whether the owner of a lot, who is excavating its soil for a lawful purpose, is liable in damages to an adjacent proprietor for injuries caused by negligence in making such excavation, but simply whether the owner of such lot, who, making such excavations in a manner not in itself negligent, has caused to settle, a building erected on the adjoining lot and deriving support from such soil without having acquired any right to such support, is liable to an action for the injury, simply because he had given no previous notice to the owner of the building of the intended excavation. From a very early period, judicial consideration has been given to the right of support to soil in its natural state, and to artificial structures erected thereon by the soil of adjacent or subjacent lands.

A complete review of the course of decisions in England can be found in the opinions of Baron Pollock in Dalton v. Angus, L. R. 6 App. Cas. 740, and of Chief Justice Gray in Gilmore v. Driscoll, 122 Mass. 199. It is thereby thoroughly settled as the law of Great Britain, that the undisturbed maintenance by an owner of a building erected on the confines of his land, and supported by the soil of adjoining lands for a period requisite to make title by adverse possession, will establish in such owner, a right to that support. While there are conflicting views as to the legal source and character of the right (Dalton v. Angus, *supra*), all agree that unless acquired, the right cannot be invaded by removal of the supporting wall without liability for the resulting damage. Whether this doctrine has been adopted in this country, may perhaps be open to question.

In the case at hand, however, plaintiffs had not by length of maintenance of their house, acquired any right of lateral support, if they could have done so. But it is settled by the general concurrence of courts administering the common law, that when a building on the land of its owner derives actual support from the soil of adjacent land of another owner, but has acquired no right to such support, the latter owner may, for any lawful purpose, excavate and remove his supporting soil, without any liability for injury occasioned thereby to the building, provided he does not act wantonly or without the exercise of due care and prudence. In the principal case, the excavation was for a lawful purpose, and liability for the injury occasioned will only attach to the owner if his act in excavating was, in the eye of the law, negligent. Negligence is the want of that care which under the circumstances, is due. As the only negligent act charged is the lack of notice, the question herein resolves itself into this: viz:—whether it was defendant's duty to give notice of his excavation to plaintiffs. The able dissenting opinion of Magie, J., shows that there are two sides to the controversy in question, and that neither upon principle nor authority is the conclusion of the majority of the court free from doubt. In order that the student may have before him the argument upon both sides of the question, we here present in part the view of the dissenting judge. Upon principle, the owner in excavating as he has a right to do, is under a duty to do the work with care

and prudence, so as to do no unnecessary injury to the right of the owner of the building in its support on his own land. And there is ample authority for this doctrine, that in removing lateral support even where he has a right to do so, the party removing it, must use due care, and if by his negligence, he inflicts unnecessary damage, he is responsible therefor. Washb. Easem. 437; Panton v. Holland, 17 Johns. 92, 8 Am. Dec. 369; Stevenson v. Wallace, 27 Gratt. 77, 89; Dixon v. Wilkinson, 2 Mc Ar. 425; Dodd v. Holme, 1 Ad. & E. 493; Davis v. R. R. Co., 2 Scott N. R. 74, 1 Man. & G. 799, 2 Eng. Ry. & C. Cas. 308, 1 Drink. 1; Lukin v. Godsall, Peake Ad. Cas. 15; Trower v. Chadwick, 3 Bing. N. C. 334; Austin v. R. R. Co., 25 N. Y. 334; Boothby v. R. R. Co., 51 Me. 318; Shafer v. Wilson, 44 Md. 268, 280; Baltimore, etc. R. R. Co. v. Reaney, 42 Md. 117; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Quincy v. Jones, 76 Ill. 231, 241, 20 Am. Rep. 243; Charless v. Rankin, 22 Mo. 566, 66 Am. Dec. 642; Walters v. Pfeil, 1 Moody & M. 364; Shrieve v. Stokes, 8 B. Mon. 431, 48 Am. Dec. 401; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Meyer v. Hobbs, 57 Ala. 175, 29 Am. Rep. 719. A failure to perform this duty will be negligence, but negligence cannot be predicated of a failure to give notice, for such a duty is not laid upon him. Neither, it is contended, is the doctrine announced established by authority.

Among the many litigated cases on the subject of lateral support which engaged the English courts, before the separation of this country, none has been discovered in which this doctrine has been even hinted at. In 1833, Chancellor Walworth in dealing with a case not involving this question, made this statement: "From the recent English decisions it appears that the party who is about to endanger the building of a neighbor by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot, proper notice of the intended improvement." Lasala v. Holbrook, 4 Paige 169. To support this statement, he cites Peyton v. Mayor, 9 Barn. & C. 725; Walters & Pfeil, 1 Moody & M. 362, and Massey & Goyder, 4 Car. & P. 161. All these cases were decided in 1829.

It appears that this statement of Chancellor Walworth is the sole basis of the claim that the doctrine contended for is established by authority. The independent opinion of that eminent jurist would go far to establish the doctrine. But as has been seen, no opinion was called for, and none was expressed by him. Moreover the cases referred to, do not support his statement, as an examination will reveal.

In Trouer v. Chadwick, 3 Bing. N. C. 334, Baron Parke after quoting the language of Chief Justice Tindal in the court below to the following effect, "as to the allegation that it was the duty of defendant to give notice to plaintiffs of his intention to pull down his wall it is objected, and we think with considerable weight, that no such obligation results as an inference of law from the mere circumstance of the juxtaposition of the walls of defendant and plaintiff," adds, "we also think it impossible to say that under such circumstances the law imposes upon the party any duty to give his neighbor notice."

Notwithstanding this unmistakable deliverance, the statement of Chancellor Walworth commenced and has continued to be cited as expressing the conclusions of English courts on this subject. In the edition of the third volume of Kent's Commentaries which was published in 1840, it is stated that "if the owner of a house in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives due notice of his intention to the owner of he adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he remove his own with reasonable and ordinary care." This statement was not made in the first edition of that volume, which was published in 1828. From that fact, and from the note to the passage above quoted, it is plain that it was based upon Lasala v. Holbrook, and the English cases of 1829. The case of Chadwick v. Trower was not alluded to. After the decision of Trower v. Chadwick, Gale & Whatley, in their treatise on Easements, discussed the question of the duty to give notice, now contended for, and declared their opinion that, if the observations of Chief Justice Tindal in that case were well founded, no such duty was imposed by law. Those observations were, as we have seen, adopted, and approved by the exchequer chamber. Subsequent authors in this country have expressed views in respect to the duty to give notice such as have been contended for, but they refer for English authority only to the cases of 1829, on which the statement in Lasala v. Holbrook had been based. The case of Chadwick v. Trower is not mentioned. Lawson's Rights, Remedies & Practice, Vol. 6, § 2785, p. 4542, also lays down this doctrine, in the following languge: "He must give notice of his intention so that the owner may have an opportunity to provide against any threatened danger." This and other text works refer to American cases as authority for the doctrine. Of these cases it is thought that there is not a single one justifying the statement.

The cases generally cited are Shrieve v. Stokes, 8 B. Mon. 453; Winn v. Ables, 35 Kan. 85; Shafer v. Wilson, 44 Md. 268. In Shrieve v. Stokes, the question of the obligation to give notice was not raised by the pleadings or the evidence. What was said by the court on the subject was incidental and based on the supposed authority of the English cases of 1829. In Winn v. Ables, the question of duty to give notice was not involved. In Shafer v. Wilson, the question of liability for want of notice was raised. The court below instructed the jury that notice was a duty. In reviewing this instruction, the court above only says that such notice would seem to be a reasonable precaution and bases this statement on Lasala v. Holbrook.

It would therefore seem that the doctrine contended for has not the sanction of authority, and, as the dissenting justice well says, a judicial determination that notice is necessary in such cases cannot prescribe the form of notice or fix the time or provide for constructive notice.

Must the notice be in writing or will verbal notice or knowledge suffice? How shall notice be given to the owner of the building if he be an infant or *non compos mentis*, or non-resident? Such and other similar questions, the owner when confronted by the rule promulgated by the majority of the court, must determine according to his own view of what is reasonable, but conscious that the jury may disagree with his view and hold him liable. In other words, the argument in behalf of plaintiff seems to confound the rules of neighborly courtesy with the rules of law. Politeness to a neighbor might dictate the giving of notice to him in many instances where the law would not require any.

What is attempted to be settled in this case, is the rule of a law to govern an owner in the use of his undoubted rights therein. We are constrained to think that there is much plausibility and force in the view of the dissenting judge.

CORRESPONDENCE.

THE NEW RULES OF THE MISSOURI SUPREME COURT.

In 1889 the General Assembly of Missouri amended the law concerning appeals so as to permit an appellant or plaintiff in error to file an abstract of the record instead of a complete transcript (see section 2253, Rev. Stat. 1889). The object of the change presumably was to make appellate proceedings more concise and less expensive. Opinions differ as to the real merits of the change and it has so far met with no encouragement from the courts. Judge Thompson in Holman v. Kerr, St. Louis court of appeals, 1891 (not yet reported), speaks of "the unfortunate character of that statute" and "the confusion which it is certain to introduce into judicial procedure." The statute provides that the appellate courts shall make appropriate rules to carry the new provision into effect. None were promulgated by the supreme court until June this year (see new rules in volume 102 Missouri reports). So far as the writer is informed none have yet been framed by the court of appeals.

Under new rules 11, 12 and 14, of the supreme court and the law to which they apply, it seems that appellant may now follow one of three methods:

First: (Under rule 11), he may, *fifteen* days before the first day of the term of the supreme court file a certified copy of the record, entry of the judgment, order or decree appealed from, together with the order granting the appeal, and thereafter, and at least *sixty* days before the case is set for hearing, deliver to the respondent a printed abstract in lieu of a complete transcript and within the same time file ten copies thereof with the clerk of the supreme court—the respondent (if dissatisfied), may thereupon deliver to the appellant and file with the clerk of said court a complete or additional abstract, the same to be filed served at least *thirty* days before the cause is set for hearing; whereupon appellant (if dissatisfied), may serve upon respondent and file with said clerk his objections to such complete or additional abstract; such objections to be served and filed not less than *ten* days before the cause is set for hearing; upon the filing of such objections by appellant, the court will send for a certified copy of that part of the record so in dispute.

Second: (Under rule 12), he may, as under the old practice, cause a complete manuscript transcript to be filed with the clerk of the supreme court *fifteen* days before the first day of its term and thereafter, and at least *thirty* days before the day on which the cause is set for hearing, deliver to respondent a copy of an abstract of the record and also file ten copies thereof with the clerk of the supreme court not later than *the day preceding* the day on which the cause is set for hearing—the respondent (if dissatisfied) may deliver to appellant a further or additional abstract at least *five* days before the cause is set for hearing and file ten copies thereof with the clerk of court *on the day preceding* that on which the cause is set for hearing.

Third: (Under rule 14) he may cause a complete transcript to be printed and indexed and file one copy, duly certified by the clerk of the trial court, with the clerk of the supreme court *fifteen* days before the first day of the term to which the appeal is taken; and thereafter, and at least *sixty* days (?) before the case is set for hearing, deliver to the respondent an uncertified copy of said printed record and within the same time file ten uncertified copies with the clerk of the supreme court. When this is done no abstracts of ny kind are required.

The labor of preparing abstracts pertains to the first and second methods alike, but the responsibility of doing that work under the first method is obviously greater, because there is no complete record in the appellate court to refer to in case of oversight, omission or unexpected emergency at the hearing, and it may be questionable whether under this new practice the supreme court will entertain a suggestion of diminution of record made by an appellant as to the abstract prepared and filed by himself in lieu of a complete transcript. It will also be noted that under the first method counsel for appellant will have to prepare his abstract thirty days earlier than under the second method. Under the third method the work and responsibility of counsel appears to be reduced, while that of the court is increased. In the matter of costs the first method is the least expensive. The relative cost of following the third method will depend upon the size of the record.

The writer apprehends that rule 14 (the third of above methods) was intended to apply to cases pending when the rule was adopted, as well as to cases thereafter appealed; if this view is correct appellant may obviate the necessity of preparing an abstract in pending cases by causing the entire record to be printed, serving one copy on respondent and filing ten copies in court.

G. A. FINKELNBURG.

BOOK REVIEWS.

COOKE ON LIFE INSURANCE.

It is about seventeen years since the publication of the last comprehensive American treatise devoted to the law of life insurance. This was the work of Bliss, second and last edition of which appeared in 1874. The work of May, a new edition of which recently appeared, covers the subjects of fire and guarantee insurance, and almost necessarily gives a secondary and subordinate place to the important subject of life insurance. The works of Bacon and Niblack, published in 1888, are confined to insurance by mutual benefit societies. Hence, as the author says, there seems to be ample justification for the publication, at this time, of a comprehensive treatise on the law of life insurance, especially in view of the extremely rapid recent development of the law on this subject, particularly in its application to mutual benefit societies.

The present work covers in a concise, and at the same time, admirable manner, the entire subject of life insurance, including accident insurance and insurance by mutual benefit societies. The notes are copious and exhibit diligence and care upon the part of the author. The citation of authorities seems to be exhaustive and we have no doubt the critical examiner will find it free from any substantial defects. We have especially to commend the mechanical execution of the work, the printing and typographical appearance being unusually good.

THORNTON ON LOST WILLS.

The only criticism that may be offered of this little work of nearly two hundred pages, if criticism it be, is the narrow scope of the subject treated. But this is an objection which if the author or publisher does not regard, the reader and examiner has no reason to complain of. It may also be said that little attention has heretofore been given, by the authors of treatises upon the general subject of wills, to the subject of this work, and therefore it is liable to have an exceptional

value. It may be said moreover that on the subject of which it treats, it is entirely accurate and quite exhaustive of the authorities. It goes into the subject of jurisdiction of courts to establish wills, when a lost will may be proved, the pleading and points of practice in connection therewith, how proof of execution of lost will may be made, the presumption of revocation, the sufficiency of evidence to prove a lost will, competency of witness to make such proof and the trial, issue, verdict, and decree in connection therewith.

The book necessarily cites many leading English cases, but the American cases will also be found therein. To any one interested in the subject of lost wills, we commend the work.

AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW VOL. 16.

As this work proceeds, we are the more impressed with its value to the practitioner, and especially to him who has not the advantage of access to large law libraries. The present volume has an exceedingly well written article upon national banks, and a discriminating article of considerable length upon the subject of negligence. The subject of new trial comprehends nearly two hundred pages. Novation and nuisances are exhaustively discussed. The paper on negotiable instruments might have been longer, though as a matter of fact this subject is probably more extensively treated in the more specific papers upon promissory notes, bills of exchange, etc.

JETSAM AND FLOTSAM.

A SLUR UPON AN EMINENT LAWYER.—A newspaper interview with a senator of the United States from one of the Dakotas, whose name we have forgotten, has illustrated the fact that a "statesman" can make himself very ridiculous if he tries. He is reported to have characterized Hon. John W. Noble, the Secretary of the Interior, as grossly unfit for the post which he holds, and as having said that he could not make a living as a lawyer in any western town. For ten or fifteen years previous to receiving his appointment in President Harrison's cabinet, Gen. Noble's professional income had probably never fallen below twenty five thousand dollars a year. He took a fee of fifty thousand dollars in one case. It is probably more than the senator in question ever earned as a lawyer in his whole life. It was a great pecuniary sacrifice for Gen. Noble to quit the practice which he had in St. Louis, and enter the cabinet. He was literally called to the cabinet. The appointment was entirely unsolicited, and was a very great surprise to him when it was tendered to him. The fact that he has not pleased all the politicians, and especially those of his own party, is by no means discreditable to him. It illustrates his firm, honorable and upright character. He is a man that is thoroughly determined to do right. Corrupt politicians cannot twist him around their fingers. He is plain, outspoken and unevasive, and entirely destitute of what is called diplomacy. If he had a little more *suaviter in modo* to go a long with his conspicuous *fortiter in re*, he would be a better politician and a worse man.—*American Law Review.*

FALSE PRETENSES.—A curious prosecution for false pretenses was brought in the interior of Pennsylvania during the past few weeks. A young woman had a lover whom she did not fancy. She also has a father. The lover induced the father, for a valuable consideration to him in hand paid, etc., to exert his persuasion and authority, as a result of which the young woman finally consented to the issuing of the necessary marriage license. The would-be husband embraced his bride-elect, but in doing so betrayed the fact that he had a cork leg. The girl refused to marry anything but a whole man. Thereupon the enraged and disappointed swain procured the father's arrest on a charge of obtaining money under false pretenses. Whether the old gentleman gave leg-bail or not is not stated.—*Criminal Law Magazine.*

DOG EVIDENCE.—Mr. Joseph A. Willard who, for a quarter of a century and more has been the clerk of the Superior Court, for the county of Suffolk, Massachusetts, and the most genial and learned of clerks, tells the following dog story:—A case concerning the ownership of a dog was on trial before a judge, noted as a combination of wit and stupidity. The trial had continued some time and little had been accomplished when the judge remarked: "Well, the only thing to do, it seems to me, it is to find out in some practical way the real owner of the dog. Mr. Plaintiff, you stand in that cornor and Mr. Defendant, you stand in the opposite corner. Now, Mr. Clerk, you take the dog to the middle of the room. When I count three the gentlemen will begin to call, you let the dog go, and we will see what he will do." Everything was done as ordered. At the signal from the judge the dog was released, and the plaintiff and defendant began to whistle and snap their fingers. The dog hesitated a moment and then made a bee-line for an open door which chanced to be about midway detween the two would-be owners. "Enter the case undecided," said the judge.

HUMORS OF THE LAW.

During a trial, many interruptions having taken place, the judge at last, using his authority, said he would commit anybody who was guilty of such a want of respect to the court. This threat was followed by a dead silence for a time, which was finally interrupted by two men conversing in a loud tone. The judge, observing it, said,—

"I see that you two men are still determined to set my authority at naught, and I shall commit you."

"Your honor," replied one of the two, "this man, against my will, keeps on talking to me."

"What was he talking about or saying to you?" asked the judge.

"Why, he said your honor was a d——d fool!

Instantly the other got up and exclaimed: "Your honor, I said it in perfect confidence."

Judge Duffy: And you saw the prisoner strike the complainant?

Witness: Yes, your honor.

Judge: And had he given provocation?

Witness: Why, you see he out pulled a roll of bills.

Judge: And you mean to say the prisoner struck him for that.

Witness: Well, he struck him for some of it.

The prisoner at the bar was doing his best to make out his case. I didn't know, he said, that there was any—

—I beg your pardon, interrupted the prosecutor. Ignorance of the law excuses no man.

—Oh, doesn't it? responded the prisoner, with fine sarcasm; then what are you asking me to excuse you for?

In a case against a respondent charged with the crime of arson, one witness was asked by the court: "When you looked in the fireplace that evening, was there anything combustible there?" To which the witness replied, after deliberating: "I sware, jedge, I didn't see nothin a-bustin there."

Some years ago the court crier at Keene, N. H., had the habit of exclaiming quite frequently in conversation, "by the way," with which he often prefaced his remarks. When the court opened at Keene he began in the usual form to announce the fact: "All persons having anything to do before the honorable the justices of the court of common pleas, now sitting at Keene, within and for the county of Cheshire, may now draw near, give their attendance and they shall be heard." Here the crier dropped into his seat, when the thought occurred to him that he had ommitted the customary invocation, and up he jumped with the startling exclamation: "By the way, God save the State of New Hampshire!"

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION — Vendor's Lien.—Under Rev. St. Tex. art. 1827, which provides that all application for letters of administration upon an estate must be filed within four years after the death of the intestate, if administration is not had within that time the probate court loses jurisdiction to issue letters, and a vendor's lien again becomes prior to all other claims against the estate made prior by statute, in cases of administration, and a trustee may thereafter convey premises held in trust to secure such lien, upon default being made in any payment thereunder.—*Rogers' Heirs v. Watson*, Tex., 17 S. W. Rep. 29.

2. ADMIRALTY—Maritime Lien—Discharging Vessel.—When libelant, a longshoreman, began discharging a vessel he was in the employ of a stevedore, but, the stevedore having left, libelant continued the work with the crew of the vessel, and on a verbal contract with the master. *Held*, that the service was maritime, and rendered on the credit of the vessel, and that libelant had acquired a lien on the vessel for the amount of the compensation.—*The Mattie May*, U. S. D. C. (N. Y.), 47 Fed. Rep. 69.

3. ADMIRALTY—Neutrality Laws.—Rev. St. U. S. § 5283, rovides for the forfeiture of every vessel which, within the limits of the United States, is fitted out and armed, or attempted to be so, to be employed in the service of any foreign prince, State, or people to commit hostilities against the subjects, citizens, or property of a prince, State, or people with which the United States are at peace. *Held*, that under this section no forfeiture can be claimed of a vessel which is only employed to transport arms and munitions of war to a vessel fitting out to pursue the forbidden warlike enterprises.—*The Robert and Minnie*, U. S. D. C. (Cal.), 47 Fed. Rep. 84.

4. ADMIRALTY—Shipping—Charter Party.—A charter-party for the period of six months contained the clause; "Vessel, if kept over the charter time, the same rate as the charter, with the privileges of six months over the charter if wanted." *Held*, that the charterers had the right to keep the vessel for such time as they wished not exceeding six months additional in all, at the charter price.—*Hunt v. Metcalf*, U. S. D. C. (Cal.), 47 Fed. Rep. 73.

5. ADMIRALTY—Shipping—Supplies.—In a libel against a vessel for supplies and advances made in a foreign port, evidence that the supplies were given and the money advanced in good faith, on the order of the master, is sufficient *prima facie* proof that such supplies and advances were necessary.—*The Bellevue*, U. S. D. C. (S. Car.), 47 Fed. Rep. 86.

6. ADMIRALTY — Towage — Negligence.—A propeller having a schooner in tow made a trip on Lake Huron at the very end of the navigation season. On passing a certain harbor, the weather gave indications of a storm, but the propeller kept on her course. The storm soon grew to be one of unprecedented severity, and, while the vessels were near a lee shore, the tow-line broke, and the schooner was wrecked. *Held*, that the act of the master in keeping on his course in such an emergency was not negligence.—*The Wilhelm*, U. S. D. C. (Mich.), 47 Fed. Rep. 89.

7. ALTERATION OF INSTRUMENT—Penal Bond.—An interlineation in a penal bond, after execution of the words "together with 10 per cent. attorney's fees," will not invalidate the bond, as the recovery is limited to the penalty by How. St. Mich. §§ 7737, 7739.—*White Sewing Mach. Co. v. Dakin*, Mich., 49 N. W. Rep. 553.

8. ANIMALS—Vicious Dog.—Pub. St. Mass. ch. 102, § 93, providing that every owner "or" keeper of a dog shall be liable to any one injured thereby, does not create a joint or several liability; and a person who brings an action against the owner, but fails to collect his judgment on account of the latter's insolvency, cannot afterwards bring an action against the keeper.—*Galvin v. Parker*, Mass., 28 N. E. Rep. 244.

9. APPEAL—Appellate Court.—The right of a corporation to use a name as a trade mark is not a franchise, within Rev. St. Ill. p. 401, which provides that the appellate courts shall have jurisdiction of all appeals except in cases involving a franchise, etc., in which cases appeals shall be to the supreme court; and, in a suit to enjoin the use of such name, an appeal lies to the appellate court.—*Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, Ill., 28 N. E. Rep. 248.

10. ATTACHMENT SUBJECT TO MORTGAGES. — Where mortgaged goods are levied on by a sheriff under an attachment subject to the mortgages, he thereby recognizes the validity of the mortgage liens, and cannot hold possession, as against the mortgagee, on the ground that the mortgages are being used to defraud other creditors.—*Rosenfield v. Case*, Mich., 49 N. W. Rep. 630.

11. ATTORNEY AND CLIENT—Legal Services.—Where an attorney testifies that his client authorized him to employ counsel to assist in the case, it is competent to show, as affecting his credibility, that he had agreed to conduct the case to a successful issue.—*Frazer v. Haggerty*, Mich., 49 N. W. Rep. 616.

12. BANKS AND BANKING—Savings Banks—Pass book.—A stranger, H, presented for deposit at defendant savings bank in Connecticut a check on another bank, and received two pass books, a portion of the amount being entered in each. The check proved to be fraudulent,

and the bank published notice thereof. Afterwards H presented one of the books to plaintiff in Dublin, requesting a loan thereon. Plaintiff declined, but afterwards gave to a bank there his draft, accepted by H, and indorsed by himself. The bank discounted the draft for H, and took the book, with his order for collection. On learning that the book was obtained by fraud, the bank returned it to plaintiff, who paid the draft. *Held*, that plaintiff, was guilty of negligence, and was not a *bona fide* holder of the book.—*McCaskill v. Connecticut Sav. Bank*, Conn., 22 Atl. Rep. 568.

13. CARRIERS OF CARGO—Delivery.—On a vessel's arrival at her port of discharge, no owner appeared to receive the cargo, and it was placed in store by the master, subject to the ship's lien for freight. Subsequently, on suit begun against the cargo for the freight, the owner appeared and took the cargo, giving security for the freight. *Held*, that the cargo owner could not thereafter contend that no delivery had been made.—*The Adella S. Hills*, U. S. D. C. (N. Y.), 47 Fed. Rep. 76.

14. CHECKS—Withdrawal of Funds.—Defendant gave a check signed by him as "Agent." He did not disclose for whom he was acting as agent, if for any one, and he afterwards withdrew the money deposited to himself, as agent, and deposited it to his individual account. *Held*, that an action by an indorsee who had lost the check was properly brought against defendant individually as a drawer.—*Armstrong v. Brolaski*, U. S. C. C. (Mo.), 46 Fed. Rep. 903.

15. COMMUNITY PROPERTY.—A husband and wife jointly executed a mortgage on the community property. The husband soon after died, leaving the wife and one child surviving him. No administration was had on the estate. The wife, in consideration of the community debt, executed a quitclaim deed of the mortgaged premises to the mortgagee. *Held*, that the wife conveyed all the title of the community property held by both husband and wife at the time of the husbad's death, and the child thereafter had no interest in the property.—*Ladd v. Farrar*, Tex., 17 S. W. Rep. 55.

16. CONDITIONAL SALE.—Under Laws N. H. 1885, ch. 30, which provides that no lien reserved by the seller on personal property sold on conditions "shall be valid against attaching creditors without notice," unless a written memorandum of the sale, signed by the purchaser, is recorded, it is immaterial whether the memorandum of sale was recorded or not, if the attaching creditor had full notice of the conditional sale of the property attached before the attachment was issued.—*Batchelder v. Sanborn*, N. H., 22 Atl. Rep. 535.

17. CONSTITUTIONAL LAW—Counties—Competitive Bids.—Under Const. Ark. art. 19, § 16, which provides that "all contracts for erecting bridges in any county shall be given to the lowest responsible bidder under such regulations as may be provided by law." Act Ark. Feb. 19, 1891, which provides that the board of county commissioners shall at the same time advertise for plans, specifications, and bids, and adopt plans and specifications and accept a bid thus obtained, is unconstitutional, since there can be no real competition unless all bids are based on the same detailed specifications.—*Fones Bros. Hardware Co. v. Erb*, Ark., 17 S. W. Rep. 7.

18. CORPORATIONS—Authority of President.—The president of a lumber company who, while in open and notorious charge of the business, employs a sawyer for an entire season, will be presumed, in the absence of contrary evidence, to have authority to do so.—*Ceeder v. H. M. Loud & Sons' Lumber Co.*, Mich., 49 N. W. Rep. 575.

19. CORPORATIONS—Dissolution.—Const. Tex. art. 4, § 22, provides that the attorney general shall especially inquire into the charter rights of all private corporations, and in the name of the State take such action in the courts as may be proper to prevent any private corporation from excercising any power, or demanding or collecting any species of taxes, tolls, freights, or wharfage, not authorized by law, and shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters: *Held*, that the attorney general can maintain such suit only when public interests will be subserved thereby, and not to restrain unlawful action on the part of the corporation which will affect only private interests.—*State v. Farmers' Loan & Trust Co.*, Tex., 17 S. W. Rep. 60.

20. CORPORATIONS—Powers of Agents.—A resolution of the board of directors of a corporation which authorizes a director "to make contracts of sale of the lands of the company" does not authorize such director to convey land as attorney in fact of the corporation.—*Green v. Hugo*, Tex., 17 S. W. Rep. 79.

21. CORPORATIONS — Subscription to Stock.—Defendants signed a subscription paper reciting that "we, the undersigned citizens of S, promise to pay the trustees of the hotel to be built at S the sums set opposite our names, to be taken as stock, $25 per share." It was represented to them by the citizens' committee, soliciting subscriptions, that the hotel would cost $150,000, and that this paper was informal, and was merely "to see what could be done," and that a binding subscription paper would be presented later. When this was presented, defendants refused to sign. Afterwards a corporation was formed, and an hotel built, costing about $110,000, and stock to the amount subscribed was tendered, but refused by defendants. *Held*, they were not liable to the corporation for the sum thus subscribed.—*Plank's Tavern Co. v. Burkhard*, Mich., 49 N. W. Rep. 562.

22. CREDITORS' BILL—Nulla Bona.—A creditors' bill cannot be maintained upon a judgment on which execution was issued and returned unsatisfied, when the return does not expressly show that there was no property subject to levy.—*Buckeye Engine Co. v. Donau Brewing Co.*, U. S. C. C. (Wash.), 47 Fed. Rep. 6.

23. CRIMINAL LAW — Murder — Venue.—In a murder trial, it appeared that deceased was killed at her residence, which was variously from 9 to 14 miles from the county-seat of the county in which the crime was alleged to have been committed, but in what direction was not shown. The distance of the county-seat from any county line did not appear, though it was probable that in some directions it was not over 10 miles. *Held*, the venue was not sufficiently proved.—*Dobson v. State*, Ark., 17 S. W. Rep. 3.

24. CRIMINAL PRACTICE—Rape.—An indictment alleging that defendant "feloniously, forcibly, and against her will did carnally know one Jennie Jones" charges rape, and under it defendant cannot be convicted of the crime of carnally knowing a female child under the age of puberty.—*Warner v. State*, Ark., 17 S. W. Rep. 6.

25. CRIMINAL TRESPASS—Evidence.—Gen. St. Conn. § 1454, provides that every person who shall enter upon the inclosed land of another without the permission of the owner thereof, for the purpose of fishing, etc., shall be fined: *Held*, in a prosecution by the grand juror for a violation of such statute, that the knowledge of defendant that his act was unlawful is immaterial, and evidence thereof will be excluded.—*State v. Turner*, Conn., 22 Atl. Rep. 542.

26. DEED—Acknowledgment.—Where a certificate of acknowledgment shows the county in which it was taken, it will be presumed that the officer was authorized to act in the county named, though it does not appear that he is an officer for the county by his certificate.—*Chamberlain v. Pybas*, Tex., 17 S. W. Rep. 50.

27. DEED—Construction—Condition for Free Passage.—Where a deed to a railroad company of a right of way over lands contained a condition that the "grantor and his family" should have free passage over the road in the cars of the company, the word "family" means those living in the grantor's house and under his management, and the right does not extend so as to include the grantor's granddaughter, who does not live with him.—*Dodge v. Boston & P. R. Co.*, Mass., 28 N. E. Rep. 243.

28. DEED—Delivery.—Where a husband executes a deed to his wife, and files it for record and for the purpose and with the intention of passing title to her as of the date of the deed, he thereby makes a valid delivery

of the deed, and title passes to his wife, though the deed remained in the husband's possession.—*Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co.*, Mich., 49 N. W. Rep. 595.

29. DEED—Surrender.—Where a grantor conveys land, and delivers the deed to the grantee, on a verbal agreement as to its future disposition in certain contingencies, the redelivery of the deed to the grantor does not reconvey the title, since a deed cannot be delivered to the grantee as an escrow.—*McAllister v. Mitchener*, Miss., 9 South. Rep. 829.

30. DEPOSITION—Cross-examination.—The deposition of a witness on direct examination by plaintiff will not be excluded on the ground that the witness died before he was cross-examined, where defendant procured the cross-examination to be postponed, and the witness died in the mean time.—*Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, U. S. C. C. (N. J.), 47 Fed. Rep. 4.

31. DIVORCE—Collusion. — Before filing her bill for divorce, a wife had several conversations with her husband relative to the matter, and about three months before the trial he had offered her $500 if she would get a divorce. The bill was not filed by reason of any of those conversations, but because he used physical violence upon her, had been living with other women, and had gone to his father's funeral with one of them, and because of his failure to support his wife: *Held*, there was no collusion.—*Reed v. Reed*, Mich., 49 N. W. Rep. 587.

32. DURESS — What Constitutes. — In an action of *assumpsit* for money paid under duress, it appeared that plaintiff, a man 72 years old, and ignorant of the law, was threatened by defendant with prosecution, imprisonment, and a fine of $500 for selling cider without license, unless he would pay defendant $150. Plaintiff was confronted by several men, who claimed he sold them cider, and was informed by defendant that the men would so testify. Defendant claimed great knowledge of law, and under his threats the plaintiff paid the $150 without any consideration: *Held*, that the duress was a question for the jury.—*Cribbs v. Sowle*, Mich., 49 N. W. Rep. 587.

33. ELECTIONS— Fraud — Opinion Evidence. — In an election contest, it appeared that the ballot box used at the election was furnished with an apparatus designed to mark the ballots, as they were deposited, with a mark made by a needle and a slight milling on the edge. A witness testified that he had repaired such boxes, and gave his opinion as to whether marks on ballots were made by the machine. It was not shown that the witness had any previous experience with regard to marks made on ballots by the machine: *Held*, that he was incompetent to testify as an expert as to whether marks on tickets had been made by the machine.—*Convery v. Conger*, N. J., 22 Atl. Rep. 549.

34. EMINENT DOMAIN—Street Railroads.—A street railway constructed by making cuts and fills, thereby obstructing access to abutting premises, creates an additional burden on the land from that implied by the dedication of the highway, and the abutting owner may enjoin its operation, where the road was constructed without making compensation for the injury done.—*Nichols v. Ann Arbor, etc. Ry. Co.*, Mich., 49 N. W. Rep. 588.

35. EQUITY— Relief from Forfeiture. — Where a will provides that a daughter of testatrix shall have the use of the homestead during her life, that she shall pay all taxes on it, and keep the building in good repair and fully insured, and that a failure to pay the taxes, and insurance for one year will work a forfeiture, a in consequence of the devisee's ignorance of her rights, failure to pay the taxes will not work a forfeiture of the devise, and a court of equity will restore the property on payment of taxes and costs.—*Tibbetts v. Cate*, N. H., 22 Atl. Rep. 559.

36. ESTOPPEL IN PAIS — Sale — Chattel Mortgages.—Where the seller of a stock of millinery agreed with the father of the purchaser that, if he would advance $500 as part payment for the goods, he should be reimbursed by the purchaser out of the first sales before payment of the balance, and thereafter the purchaser gave her father a mortgage on the goods as security for the money advanced, the seller is estopped from claiming any lien for the unpaid balance as against the assignee of the mortgage.—*Finn v. Donahue*, Mich., 49 N. W. Rep. 632.

37. EVIDENCE. — In an action in a justice court by building contractors to recover for labor performed by their workmen, a time-bill was received in evidence without objection; but, on appeal to the district court, it was objected to as incompetent and not the best evidence. The bill had been transcribed from the book of original entry which was made up every Saturday night from the report of the foreman. The foreman was dead, and the book could not be found: *Held*, that in the absence of anything tending to impeach its correctness, the bill was admissible.—*McDonnel v. Ford*, Mich., 49 N. W. Rep. 545.

38. EVIDENCE—Declarations—Res Gestæ.—Where the issue presented is as to whether a lawyer took a contract in his own name for the benefit of his client, anything which he may have said about the transaction to others, which was no part of it, is not admissible as part of the *res gestæ*.—*Calderon v. O'Donahue*, U. S. C. C. (N. Y.), 47 Fed. Rep. 39.

39. EXECUTION — Supplementary Proceedings. — A money decree in an equitable suit in a federal court is sufficient to sustain proceedings supplementary to execution.—*Sage v. St. Paul, etc. Ry. Co.*, U. S. C. C. (Minn.), 47 Fed. Rep. 3.

40. EXECUTORS AND ADMINISTRATORS.—Where an administrator neglects to pay to the distributees the shares decreed to them by the probate court upon approval of his final report, the distributees may sue for such shares the administrator and his bondsmen, though the administrator has not been discharged.—*Stewart v. Morrison*, Tex., 17 S. W. Rep. 15.

41. FEDERAL COURTS—Residence of Corporations.—A corporation cannot be a resident, within the meaning of Act Cong. 1887, of a State other than that in which it was incorporated.—*Miller v. Wheeler & Wilson Manuf'g Co.*, U. S. C. C. (Mo.), 46 Fed. Rep. 882.

42. FEDERAL OFFENSE — Obscene Letter.— A person cannot be convicted of mailing an obscene letter when the only evidence that it was deposited in the mail is his uncorroborated confession.—*United States v. Boese*, U. S. D. C. (Cal.), 46 Fed. Rep. 917.

43. FRAUDULENT CONVEYANCES — Gifts.—One having an equitable right to a reconveyance of land on payment of a certain sum sent an agent to the holder of the legal title to adjust the indebtedness, and procure a reconveyance to be made to his wife, she paying part of the debt. On the return of the agent with the deed, a conveyance of other land was made by the husband and wife to the only child for the purpose of distributing the estate between wife and child: *Held*, that the conveyance to the wife was valid as against the heirs of the daughter, there being no fraud or collusion between the wife and agent.—*Crittenden v. Canfield*, Mich., 49 N. W. Rep. 554.

44. GUARANTY—Release.—Extending the time of payment of a note, without making any binding agreement to do so, does not release an unconditional guarantor. —*Tobin Canning Co. v. Fraser*, Tex., 17 S. W. Rep. 25.

45. GUARDIAN AND WARD.—The guardian of a spendthrift cannot be joined as party defendant with his ward in an action of debt on a judgment recovered against the ward before he was placed under guardianship.—*Pendexter v. Cole*, N. H., 22 Atl. Rep. 560.

46. GUARDIAN AND WARD—Sale of Land.—A guardian sold land belonging to his ward pursuant to an order of court, on May 24, 1878, and the sale was confirmed on August 12, 1878. The guardian did not execute a deed to the purchaser until February 18, 1879, and on the same day the purchaser reconveyed to the guardian individually, for the same consideration. Both deeds were

recorded. On May 12, 1879, the land was conveyed to a third person for a consideration more than double that expressed in the guardian's deed: *Held*, that the deed from the guardian and the immediate reconveyance showed a collusion between the parties and passed no title as against the heirs of the ward, and such record was constructive notice to the third party.—*Winter v. Truax*, Mich., 49 N. W Rep. 604.

47. HIGHWAYS—Appeal from Commissioner.—Under How. St. Mich. § 1302, providing that any freeholder aggrieved by the determination of a commissioner "in laying out, altering, or discontinuing" any highway may appeal to the township board, no appeal lies from the determination of a commissioner refusing to lay out a highway.—*Wilson v. Township Board*, Mich., 49 N. W. Rep. 572.

48. HOMESTEAD — Rights of Divorced Husband.— A husband with minor children, continuing to live on the homestead after a divorce has been granted, and the property divided, is still the head of a family, and may claim a homestead exemption, though the custody of the children was awarded the wife.—*Hall v. Fields*, Tex., 17 S. W. Rep. 82.

49. INSURANCE—Proofs of Loss.—In an action on an insurance policy, it appeared that an adjuster of the company spent several days with the assured's son and agent in making a list of the personalty destroyed, and the two employed a builder to estimate the value of certain buildings, and referred to an arbitrator the value of a dwelling on which they could not agree: *Held*, that if the adjuster's conduct would induce an honest belief that the proofs then being made were all the company required, and the assured did so believe, the jury might find that formal proofs were waived.—*Gristock v. Royal Ins. Co.*, Mich., 49 N. W. Rep. 634.

50. INSURANCE — Surrender of Policy. — Where the charter of a mutual insurance company provides that "any member may withdraw by returning his policy to the secretary, and paying all assessments for previous losses and claims then due from him," a member who directs the secretary to take his name from the books, and pays all the assessments then due, but does not surrender the policy, does not thereby terminate his membership.—*Schroeder v. Farmers' Mut. Fire Ins. Co.*, Mich., 49 N. W. Rep. 536.

51. INTOXICATING LIQUORS — Civil Damage. — Under Acts Mich. 1887, No. 313, § 20, where a wife sued on a liquor bond conditioned not to sell liquor to any person in the habit of getting intoxicated, for loss of support resulting from the death of her husband, alleged to have been caused by a person while intoxicated with liquor obtained from defendant, evidence that such person was in the habit of getting intoxicated was competent.—*Doty v. Postal*, Mich., 49 N. W. Rep. 534.

52 JUDGMENT—Variance.—Where a complaint upon a judgment alleges that it was rendered in an action wherein the parties to this suit were plaintiff and defendant, proof of a judgment rendered against defendant and another person is a fatal variance, and there can be no recovery thereunder.—*First Nat. Bank of Clarion Hamor*, U. S. C. C. (Wash.), 47 Fed. Rep. 36.

53. LANDLORD AND TENANT — Tenancy from Year to Year.—A tenant who enters into possession of premises under a parol agreement stipulating for a written lease for a year with the privilege of an additional term, and the payment of a yearly rental in monthly installments, is after acceptance of the conditions, and payment of rent, a tenant at will from year to year, although the lease is never executed; and such a tenant cannot, without justifiable cause, abandon the premises, and treat it as a surrender, without giving his landlord the year's notice required by Comp. Laws Mich. § 4304.—*Huntington v. Parkhurst*, Mich., 49 N. W. Rep. 597.

54. LIBEL—Words Actionable Per se.—An article, published in defendant's newspaper, declaring that, at a meeting of the supervisors of the poor, "some of the members advocated summary disposal of the services of" plaintiff, one of the supervisors, "in telling language, among them being S B, who most emphatically stated that" plaintiff "was a liar, a thief, and a perjurer, and that he could prove every word he said,"—is *per se* libelous.—*Orth v. Featherly*, Mich., 49 N. W. Rep. 640.

55. LIMITATION OF ACTIONS—Contracts not under Seal. —A chattel mortgage not under seal is an instrument of writing not under seal, within the meaning of the provision of the statute of limitations of February 27, 1872 (section 10, p. 733, McClel. Dig.), that actions upon any contract, obligation, or liability, founded upon an instrument of writing not under seal, must be commenced within five years after the cause of action has accrued.—*Hope v. Johnston*, Fla., 9 South. Rep. 880.

56. LIMITATION OF ACTIONS—Corporate Stock.—Where there is a decree levying an assessment on the stockholders of an insolvent corporation in respect of their unpaid stock, the statute of limitations does not begin to run against the subscriptions until such decree is rendered.—*Glenn v. McAllister's Ex'rs*, U. S. C. C. (Va.), 46 Fed. Rep. 883.

57. LOGS AND LOGGING—Measurements—Evidence.—In an action for the price of logs sold by plaintiffs to defendant, the measurements of a scaler mutually agreed on by them, when free from fraud or gross mistake, are binding on each; and, where such scaler is dead, his measurements will be presumed, without any evidence to that effect, to be honest and accurate.—*Malone v. Gates*, Mich., 49 N. W. Rep. 638.

58. MARRIED WOMAN.— Where one boarding with a family, which was supported by the husband, became ill, and was nursed by the wife, the husband is entitled to the compensation for the services of the wife, and the wife cannot maintain an action therefor, unless the husband relinquishes his claim in her favor.—*Barnes v. Moore's Estate*, Mich., 49 N. W. Rep. 585.

59. MASTER AND SERVANT.—Where a complaint against a railroad company alleges that plaintiff's son, who was a track hand in defendant's employ, was killed by the unfitness and incompetence of the manager and superintendent of the road, an instruction to find for plaintiff, if the death was caused by the unfitness or negligence of such officers, is inapplicable and erroneous where the evidence reveals no unfitness or negligence on their part, but shows clearly that the accident was caused by the negligence of the engineer or conductor.—*Galveston etc. Ry. Co. v. Arispe*, Tex., 17 S. W. Rep. 47.

60. MASTER AND SERVANT—Contributory Negligence.—An employee who, being ordered to bring freight from a depot, drives a horse, which he knows to be fractious and dangerous, within five feet of a backing engine from which steam is escaping, is guilty of contributory negligence, precluding recovery from his employer for injuries resulting from the unmanageableness of the horse, though he expressly objected to driving it.—*Mahan v. Clee*, Mich., 49 N. W. Rep. 556.

61. MASTER AND SERVANT—Contributory Negligence.—It is incumbent upon a railroad employee whose duty requires him to ride upon one of the company's trains to ride in such places as the railroad company has provided for that purpose; and, if he is injured while riding in a more dangerous position, the law will presume that his negligence contributed to such injury. But this presumption may be overcome by evidence that such employee occupied such dangerous position through or fault or negligence of his own, and not of his own free will.—*Boss v. Northern Pac. R. Co.*, N. Dak., 49 N. W. Rep. 655.

62. MASTER AND SERVANT—Fellow servant.—A person employed as a loom-fixer in a cotton-mill, whose duty is to keep the looms in repair, is not a fellow-servant of the operator of a loom.—*Jacques v. Great Falls Manuf'g Co.*, N. H., 22 Atl. Rep. 552.

63. MASTER AND SERVANT—Negligence.—A servant was engaged for his master in pulling down a slide door which was suspended by a chain over a pulley. The chain had been connected by a coiled wire, which, being rusty, broke, letting the door drop on him. The chair had not been repaired or examined for about eight

years, and the servant did not know of the defect: *Held*, that the master's negligence was a question for the jury.—*Tangney v. J. B. Wilson & Co.*, Mich., 49 N. W. Rep. 666.

64. MASTER AND SERVANT — Risks Assumed. — The plaintiff was operating a planing-machine to which the power was applied by a large belt, the motion of which was very rapid. He was familiar with such machinery. He knew, as the evidence is deemed to show, that the fastening of the belt had become insecure, so that it was liable to break apart, and called the foreman's attention to it, but the latter declined to repair it, and told the plaintiff to go on with the use of the machine: *Held*, that the plaintiff must be deemed to have known the risk, and to have assumed it.—*Anderson v. H. C. Akeley Lumber Co.*, Minn., 49 N. W. Rep. 664.

65. MECHANICS' LIENS—Sufficiency of Affidavit.—The statutory requirement, that the affidavit for a mechanic's lien describe the property for the improvement of which labor or material may have been furnished, is not complied with by stating generally that it was for a line of street railway owned by the defendant in a city named, it appearing that the defendant had several lines of railway, to either of which such designation would be equally applicable.—*Fleming v. St. Paul City Ry. Co.*, Minn., 49 N. W. Rep. 661.

66. MORTGAGES—Absolute Conveyance.—The conveyance of lands worth $6,000, by an old man intellectually feeble and unable to read or write, to a woman with whom he boarded and in whom he reposed great confidence, at a time when he was in need of money by reason of being under a guardianship, will be declared a mortgage.—*Rielly v. Brown*, Mich., 49 N. W. Rep. 557.

67. MORTGAGES—Assignment. —Gen. Laws N. H. ch. 136, § 3, provides that "no estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment or performance of which arises, is made, or contracted after the execution and delivery of such mortgage." *Held*, that an assignment by the mortgagee of a mortgage given for an existing debt, as security for future advances made by the assignee to the mortgagee, was not within the prohibition of the statute.—*Lime Rock Nat. Bank v. Mowry*, N. H., 22 Atl. Rep. 555.

68. MORTGAGES—Foreclosure. — At the sale under a foreclosure, by an administrator, of a mortgage held by him as belonging to the estate, the administrator, being a creditor of the estate, purchased the mortgaged premises in his own behalf at a price less than the amount of his debt, in effect (in the manner stated in the opinion) applying so much of his allowed claim against the estate in making such purchase. *Held*, that the heirs of the intestate, asserting their right to charge the administrator as a trustee for them of the title acquired by such purchase, should not be required to pay to him the full amount of his debt against the estate, but only so much of it as as he had applied in making the purchase.—*Lewis v. Welch*, Minn., 49 N. W. Rep. 665.

69. MUNICIPAL CORPORATION—Wharves—Construction of Charter.—The charter of a wharf company provided that it might construct a railroad along a certain street in the city of Galveston, and make switches to its wharves, which were north of the street. An ordinance of the city provided that the wharf company might have and exercise all the rights, privileges, and powers conferred by the charter, provided the wharf company so used the privileges "as not to obstruct the free passage of the streets onland south of" the street named: *Held*, that the company had no right to construct switches on the south side of its main track on such street.—*Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co.*, Tex., 17 S. W. Rep. 57.

70. MUNICIPAL CORPORATION — Grant of Exclusive Privilege.—A contract by which a city gives a water company the exclusive right to furnish the city with water for public purposes for 25 years, at a certain amount per year, is illegal, as creating a monopoly.—*Altgelt v. City of San Antonio*, Tex., 17 S. W. Rep. 75.

71. MUNICIPAL CORPORATION—Improvement of Alleys. —The alley in a city block is for the special benefit of the several lots abutting thereon, and under the provisions of subdivision 63, § 68, ch. 13*a* Comp. St. not to exceed one-half of the cost of paving thereon opposite each lot may be assessed upon such lot. If a lot has been subdivided, then the assessment is to be made upon the several subdivisions upon an equitable and just basis, in proportion to the benefits received. It is not necessary that the subdivision actually abut on the alley in order to be liable for a portion of the tax. The question of the amount of special benefits is one of fact, to be determined from the evidence.—*Lansing v. City of Lincoln*, Neb., 49 N. W. Rep. 650.

72. MUNICIPAL CORPORATION—Negotiable Certificates. —In the absence of any special statutory authority, a city has no right to issue certificates of indebtedness in negotiable form, even in payment for property which it had authority to buy.—*Bangor Sav. Bank v. City of Stillwater*, U. S. C. C. (Minn.), 46 Fed. Rep. 899.

73. MUNICIPAL CORPORATION—Ordinances Regulating Manufacture and Sale of Bread.—An ordinance of the city of Detroit, which provides that bread shall be manufactured into loaves of one, two, and four pounds, (and no other), and prohibits the sale of of bread deficient in weight, does not authorize the seizure of short-weight bread, and the prohibition is not a taking of private property without compensation. — *People v. Wagner*, Mich., 49 N. W. Rep. 609.

74. MUNICIPAL CORPORATION — Peddling Licenses.— Under the Bay City charter, authorizing the city to license hawkers and peddlers, an ordinance requiring the payment of $10 for the first day, and five for each subsequent day, by foot-peddlers; $20 for the first day, and $15 for each subsequent day, where the peddler travels with one horse; and $25 for the first day, and $15 for each subsequent day, where he travels with two or more horses, is so unreasonable and prohibitory as to render it invalid.—*Brooks v. Mangan*, Mich., 49 N. W. Rep. 633.

75. MUNICIPAL CORPORATION—Public Improvements. —Where a parliamentary question has been determined by a city council, the courts will not disturb such ruling.—*Davies v. City of Saginaw*, Mich., 49 N. W. Rep. 667.

76. MUNICIPAL CORPORATION—Street Assessments.— Where a contract for paving a street was regularly let, and the work was accepted by the board of public works, the fact that the material used and work done were not such as the contract called for is no defense against an assessment made to pay for the paving, as required by the charter of the city, and a court of equity will not enjoin the collection of the assessment.—*Dixon v. City of Detroit*, Mich., 49 N. W. Rep. 628.

77. MUTUAL BENEFIT INSURANCE.—Where the constitution of a benevolent association provides that the insurance should be paid to the heirs of the member should the beneficiary named in the policy die before the member, the instantaneous death of the member and the beneficiary renders the latter as incapable of taking the benefit as if he had died first, and the member's heirs are entitled thereto.—*Paden v. Briscoe*, Tex., 17 S. W. Rep. 42.

78. NEGLIGENCE—Dangerous Premises.—A child was injured on a railroad turn table, which was in a public and exposed place. It was unguarded and unfastened, and children were accustomed to play on it, and the company had been sued before for injuries received by another child while playing thereon. *Held* proper to submit to the jury the question whether the company's agents knew that the turn-table was located in a public place where children were likely to go, and were accustomed to go, for amusement.—*Ft. Worth & D. C. Ry. Co. v. Measles*, Tex., 17 S. W. Rep. 124.

79. PARTNERSHIP.—A member of a partnership who has obligated himself by contract with his co-partners to personally pay a partnership debt has no authority, by virtue of the partnership relation, to give a partnership note therefor; and if the creditor knowing such

facts accep such a note, extending the time for payment, he thereby discharges the partners not consenting thereto, they having the rights of sureties.—*Leithaeser v. Baumeister*, Minn., 49 N. W. Rep. 660.

80. PARTNERSHIP—What Constitutes.—When one furnished money for the purchase of pine lands, and was to be reimbursed with 8 per cent. interest, and another was to manufacture the timber, lumber, and shingles, and sell the same, as well as the land itself, and out of the proceeds pay back the money, with interest, and any balance, after paying all expenses of manufacture and sale, was to be equally divided between them, this created a partnership, and an action on contract for the money furnished will not lie.—*Corey v. Cadwell*, Mich., 49 N. W. Rep. 611.

81. PENITENTIARY—Good Behavior of Prisoners.—How. St. Mich. § 9703, provides that the board of inspectors of the State prison may establish a scale of debits and credits for good conduct or misconduct of prisoners, which shall be a part of the prison rules, and that the debits and credits shall be kept in a book, and they shall require the warden to announce the result of such behavior to each prisoner on the 1st day of each month. Section 9704, provides that the inspectors shall provide by rule how much of the good time earned a convict shall forfeit for a violation of the prison rules: *Held*, that the time forfeited by a convict for a violation of the prison rules must be governed by the rules and customs in effect at the time of the violation.—*In re Walsh*, Mich., 49 N. W. Rep. 606.

82. POWER OF ATTORNEY.—A power of attorney which gives authority to take full and absolute charge of all my business and affairs whatsoever;" to make contracts "for the sale of" lands, to execute deeds of conveyance "to whom he may or shall make sale;" to receive from the "purchaser or purchasers" the "consideration money therefor;" and to "do all matters and things whatsoever relating to the premises, as fully" as the grantor of the power might do if personally present, does not authorize a deed of conveyance in settlement of a pre-existing claim.—*Frost v. Erath Cattle Co.*, Tex., 17 S. W. Rep. 52.

83. PRACTICE— Citation — Service of Agent—Appearance.—Under Rev. St. Tex. art. 1243, providing that, where the citation or service thereof is quashed on motion of defendant, he shall be deemed to have entered his appearance to the succeeding term of court, a special appearance to quash service of citation is a general appearance to the action at the next term, although the motion to quash it is overruled.—*Ætna Life Ins. Co. v. Hannah*, Tex., 17 S. W. Rep. 35.

84. RAILROAD COMPANIES—Competing Road.—Rev. St. Mo. § 2569, which prohibits any railroad company within the State from owner, operating, or managing any other parallel or competing railroad within the State, applies only where both the roads are situated within the State, and the competition between the two must be of some practical importance, such as is liable to have an appreciable effect on rates.—*Kimball v. Atchison, T. & S. F. R. Co.*, U. S. C. C. (Mo.), 46 Fed. Rep. 888.

85. RAILROAD COMPANIES—Depot Company.—The object of the plaintiff's incorporation considered as being the combining in this corporate organization of all the railroad companies whose lines of road enter or may enter the city of St. Paul, for the purpose of providing and maintaining depot and other railroad facilities for the common benefit of all such railroad companies and of the public. In view of this purpose, and construing the provision of its charter, *held*, that railroad companies entering the city since this corporate organization are entitled, for the purpose of becoming members of the corporation, and sharing in and contributing to the benefits of the organization, to subscribe for and purchase a proper proportion of its stock at its par value.—*St. Paul Union Depot Co. v. Minnesota & N. W. R. Co.*, Minn., 49 N. W. Rep. 646.

86. RAILROAD COMPANIES—Evidence.—Where it is alleged, in an action for personal injuries resulting from a collision at a railroad crossing, that the engine was run at a negligent rate of speed a witness who has lived within a few rods of the railroad for eight years is competent to testify as to the speed of trains, though he states that his estimates are based partly on what others have told him.—*Thomas v. Chicago & G. T. Ry. Co.*, Mich., 49 N. W. Rep. 547.

87. RAILROAD COMPANIES—Negligence.—The fact that a railroad leaves freight-cars upon a side track in a thickly settled portion of a city, so as to obstruct the view of one approaching the crossing, is not *per se* negligence, but a finding by the trial court that it was negligence, under certain circumstances, will be affirmed when supported by the evidence.—*Receivers Houston & T. C. Ry. Co. v. Stewart*, Tex., 17 S. W. Rep. 33.

88. RAILROAD COMPANIES—Negligence.—Where, in an action to recover for personal injuries, the questions to be determined are what the parties did or omitted, and what a prudent man should have done under the circumstances; and the facts are such that fair-minded men might come to different conclusions,—the question of negligence is one of fact to be found by the trier, and the finding will not be reviewed on appeal, unless it appears from the record that some rule of law has been violated.—*Andrews v. New York, etc. R. Co.*, Conn., 22 Atl. Rep. 566.

89. RAILROAD LANDS—Forfeiture.—A provision in the charter of a railroad company that, if its road be not completed in a certain time, "the charter shall be forfeited," is not self-executing; and, unless the forfeiture has been judicially declared in proceedings for that purpose, lands granted to the company cannot be recovered by the State on the ground that, prior to the grant, the company had failed to complete its road within the stated time.—*Galveston, etc. Ry. Co. v. State*, Tex., 17 S. W. Rep. 67.

90. RAILROAD MORTGAGE—Material-man. — Where a railroad company whose property is covered by two mortgages buys on credit rails which are necessary for the purpose of keeping its road going, and the road is afterwards placed in the hands of a receiver on application of the second mortgagees, the seller of rails has an equitable right, as against the second mortgagees, to have the earnings of the road in the hands of the receiver applied first to the payment of his claim.—*Bound v. South Carolina Ry. Co.*, U. S. C. C. (S. Car.). 47 Fed. Rep. 30.

91. REFERENCE — Findings. — An order of reference referring the "action" to a referee, "with the usual powers," based upon the consent of the defendant in open court that the case be referred to take the testimony and report, warrants the referee in making and reporting findings of fact and conclusions of law.—*Illstad v. Anderson*, N. Dak., 49 N. W. Rep. 659.

92. REMOVAL OF CAUSES.—A petition filed by a railroad company with the State railroad commissioners, for the mere purpose of obtaining their consent to the taking of certain land by condemnation proceedings, is not removable, since it is not a suit within the original jurisdiction of the federal courts.—*New York, etc. R. Co. v. Cockcroft*, U. S. C. C. (Conn.), 46 Fed. Rep. 881.

93. REMOVAL OF CAUSES.—The filing of a petition and bond by a defendant corporation to remove a cause to the federal court does not waive an objection that the summons was served upon one who was not the company's agent, and such question may be presented to the federal court for decision.—*Forest v. Union Pac. R. Co.*, U. S. C. C. (Wash.), 47 Fed. Rep. 1.

94. RES ADJUDICATA.—Where, in an action against several defendants, the demurrers of a part of them only are sustained, and plaintiff, though granted leave to amend, obtains a dismissal before doing so, the judgment does not estop him from bringing a subsequent action upon the same ground.—*Scherf v. Missouri Pac. Ry. Co.*, Tex., 17 S. W. Rep. 39.

95. RES JUDICATA.—The defendant having, by a contract with the plaintiff, obligated himself to pay a specified sum of money at once, and at a subsequent time to convey certain real estate, subjects himself to liability in separate actions, and a judgment in an

action for the recovery of the money does not bar another action for damages for breach of the agreement to convey the land.—*Reynolds v. Franklin*, Minn., 49 N. W. Rep. 648.

96. SALE—Breach of Warranty. — In an action for money due plaintiff on written contract for the sale and erection of an electric light plant, it is no defense that defendant had been notified that certain essential features of the plant were infringements of patents granted a third party, and claims made for damages and suits threatened for such infringement, since these facts do not constitute a breach of the plaintiff's implied warranty of title.—*American Electric Const. Co. v. Consumers' Gas. Co.*, U. S. C. C. (Penn.), 47 Fed. Rep. 43.

97. SALE—Tender of Property.—The local agents of a non-resident manufacturing company sold an engine, to be partly paid for by a second-hand engine. An engine was shipped to the agents to fill the order, but the vendee refused to accept it, alleging that it did not comply with the agent's representations, and thereupon the agents returned it to their principal: *Held*, that as this deprived them of the power to make a further tender of it, the title of the second hand engine did not pass.—*Palmer v. Roath*, Mich., 49 N. W. Rep. 590.

98. SALE—When Title Passes. — A written contract, whereby plaintiff agreed to sell shingles which he was manufacturing, the title to pass on payments to be made twice each month, had been in operation several months, when the parties entered into a parol agreement that the shingles should be piled at a certain distance from the mill, and that those nearest the mill should be shipped first: *Held*, that where plaintiff shipped a car-load of those nearest the mill which were not paid for, while a large quantity paid for was yet unshipped, and the latter were burned, plaintiff can recover for such car-load.—*Summers v. Wagner*, Mich., 49 N. W. Rep. 570.

99. SALE—When Title Passes.—Under the terms of a lease, the lessee of a mill put in certain machines, with the right of removal, unless the lessors paid him the cost thereof. At the end of the term the lessors elected to take the machines, and it was agreed that certain past-due rent should be credited on the price, the rest to be paid in cash. The lessee then made and delivered a bill of sale, whereupon the lessors, in payment of the balance, tendered him a negotiable note made by him to a third person, he being ignorant until this time that it was in their possession: *Held*, that this was insufficient payment to pass title to the machines, as against one to whom the lessee had mortgaged them during the term.—*Hughes v. Daniels*, Mich., 49 N. W. Rep. 542.

100. SCHOOL BOARDS—Expenditures. — The board of education, of a school district cannot expend the funds of the district to defend a lawsuit against its members individually, who, it is claimed, have injured the business of others by refusing to entertain their bid to furnish stationery, and as a reason therefor stated to various persons that the bidders had carried on their business dishonestly, and had cheated the district.—*Hotchkiss v. Plunkett*, Conn., 22 Atl. Rep. 535.

101. SLANDER.—The words, "You are the dirty sewer through which all the slums of this embezzlement have flowed," and that "if that twenty dollars had been turned over to you or to V, [the person charged with the embezzlement], the company would never have seen twenty cents of it," spoken in a court-room, of an attorney, while he was defending one charged with the embezzlement, are actionable *per se*.—*Mains v. Whiting*, Mich., 49 N. W. Rep. 559.

102. TAX-DEED—Prima Facie Title.—A tax-deed regular on its face shows *prima facie* title in the purchaser, and, where there is no evidence in an action by a grantee of the owner to quiet title impeaching the tax-sale, the purchaser's grantee need not rely on a decree confirming it.—*Bochm v. Porter*, Ark., 17 S. W. Rep. 1.

103. TRUSTS—Accounting by Trustee.—When a party claims by his bill that he has been acting as trustee or agent, and as such is entitled to an account with his *cestui que trust* or principal, it is his duty to present with his bill his account; and, if he fails to do so, it is proper for the court, after the taking of testimony, and upon the hearing, when a reference to a master is asked for, to suspend the hearing, and require the complainant to make and present such account.—*Morgan v. Morgan*, N. J., 22 Atl. Rep. 545.

104. TRUSTS—Oral Evidence.—A trustee of lands for her separate use for life, which at her death were to go to her heirs in fee-simple, sold the same, the heirs conveying their interests by deed, and with the money purchased other lands, the heirs consenting thereto, with the oral understanding that the property bought should remain in trust for them; but the deed of purchase failed to mention the trust: *Held*, that though the oral agreement was ineffectual to create a trust, under Gen. Laws N. H. ch. 135, § 13, yet the ownership of the money used in purchasing the land could be shown by parol evidence, and a resulting trust thereby established.—*Converse v. Noyes*, N. H., 22 Atl. Rep. 556.

105. TRUSTS—Parol Agreement.—Where heirs convey land pursuant to a parol agreement that the grantee shall sell the same, and pay the proceeds to them *pro rata*, a parol trust only attaches to the money received if the land is sold, and, if confirmed by the grantee after sale, may be enforced in law; but the right to have the agreement carried out dies with the grantee, and lands so held descend to his heirs unincumbered by any trust, as such parol agreement is void under the statute of frauds.—*Collar v. Collar*, Mich., 49 N. W. Rep. 551.

106. VENDOR AND VENDEE—Boundaries.—Prior to the sale the vendee was informed by the vendor that the fences around the lot included more land than the deed described, because, as he supposed, the north fence inclosed several feet of the adjoining street. It appeared that the excess was caused by the mistake of the adjoining owner on the south in the location of his north fence. *Held*, that the information put the vendee on inquiry as to the true boundaries.—*Bohny v. Petty*, Tex., 17 S. W. Rep. 80.

107. VENDOR AND VENDEE—Flowage.—A railway company owned land along a river, and in its construction threw up an embankment. Afterwards it laid the land out into town lots, and conveyed the same without reservation. During a freshet the embankment caused the land to be overflowed, whereby a stock of goods belonging to the vendee was destroyed. *Held*, that there was no implied right to flood the land, and the company's vendee might reasonably presume that it had so constructed its embankment as not to impede the natural flow of the water.—*Sellers v. Tex. Cent. Ry. Co.*, Tex., 17 S. W. Rep. 32.

108. WAREHOUSEMAN—Injury by Fire—Carriers.—Under a contract whereby a compress company agrees to compress all cotton delivered to it by a certain carrier, and insure the same for the latter's benefit, and the carrier makes the compress company its agent to receive the same directly from the owners, the compress company, while in possession, is individually liable to the carrier for any damage thereto, to the extent that it failed to obtain insurance.—*Deming v. Merchants' Cotton Press & Storage Co.*, Tenn., 17 S. W. Rep. 89.

109. WILLS — Construction. — Where a will provides that the estate shall be held in trust, and one-half of the income paid to an only daughter of testatrix for life, the other half to an only grandchild, and, in the event of the death of the grandchild before arriving at a certain age, then, on the decease of the daughter, the estate should "descend to the heirs at law" of testatrix, the limitation "heirs at law" means the next of kin of the testatrix who are living at the death of the daughter.—*Hardy v. Gage*, N. H., 22 Atl. Rep. 557.

110. WILLS—Contest—Undue Influence.—In proceedings to establish a will, contestant, if he admits in his pleadings all the requisites of a statutory will, and contests solely on the ground of undue influence, has the burden of proof, and is entitled to open and close.—*Patten v. Culley*, U. S. C. C. (N. H.), 46 Fed. Rep. 892.